Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ANTHONY J. TUSA, JR., AND VICTOR J. TUSA, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an unissued license — or the government's right to control the issuance of a license — is the "property" of a government licensing authority, so that a person who is alleged to have used deception to obtain a license can be said to have schemed to deprive the government of "property" within the meaning of the mail fraud statute (18 U.S.C. § 1341).

2. Whether the Fifth Circuit properly deferred to the district court's decision, based on secret information presented by the government *ex parte*, to use an anonymous jury to try nonviolent defendants in the absence of any evidence that the defendants posed any threat to the jurors.

LIST OF PARTIES

The parties to the proceeding below were:

Sebastian Salvatore, Defendant-Appellant

Anthony Joseph Tusa, Jr., Defendant-Appellant

Victor Joseph Tusa, Sr., Defendant-Appellant

United States of America, Plaintiff-Appellee

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

LIST OF PARTIES . . . . . (ii)

TABLE OF AUTHORITIES . . . . . (v)

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. Factual Background 4

2. The District Court Proceedings 4

3. The Fifth Circuit's Opinion 7

REASONS FOR GRANTING THE WRIT 11

I. THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS ON THE "LICENSE AS PROPERTY" ISSUE UNDER THE MAIL FRAUD STATUTE . . . 11

II. THE ISSUE IS RECURRING, AND THE CONFLICT IS PERSISTENT . . . 15

III. THE ISSUE MERITS REVIEW BY THIS COURT 17

IV. THE FIFTH CIRCUIT'S AFFIRMANCE OF THE USE OF AN ANONYMOUS JURY IN THIS CASE ALSO DESERVES REVIEW BY THIS COURT 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Borre v. United States, 940 F.2d 215 (7th Cir. 1991) 10, 14-15 n.2

Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) 9

Carpenter v. United States, 484 U.S. 19 (1987) . . . . . *passim*

McEvoy Travel Bureau v. Heritage Travel, Inc., 904 F.2d 786 (1st Cir.), *cert. denied*, 498 U.S. 992 (1990) 16 n.4

McNally v. United States, 483 U.S. 350 (1987) . . . . . *passim*

Mylan Labs. v. AKZO, 770 F. Supp. 1053 (D. Md. 1991), *rev'd on other grounds*, 7 F.3d 1130 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994) 16 n.4

Toulabi v. United States, 875 F.2d 122 (7th Cir. 1989) . . . . . *passim*

United States v. Aguilar, 115 S. Ct. 2357 (1995) 18

United States v. Blumeyer, 114 F.3d 758 (8th Cir. 1997) 12 n.1, 15 n.3

United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) 16

United States v. Bucuvalas, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993) 8, 13

United States v. Cleveland, 951 F. Supp. 1249 (E.D. La. 1997) 16 n.4

United States v. Dadanian, 856 F.2d 1391 (9th Cir. 1988) 8, 12

United States v. DeFries, 43 F.3d 707 (D.C. Cir. 1995) 16 n.4

United States v. Dray, 901 F.2d 1132 (1st Cir.), *cert. denied*, 498 U.S. 895 (1990) 16 n.4

United States v. Evans, 844 F.2d 36 (2d Cir. 1988) 13

United States v. F.J. Vollmer & Co., 1 F.3d 1511 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994) . . . . . 14 & n.2

United States v. Ferrara, 701 F. Supp. 39, (E.D.N.Y.), *aff'd mem.*, 868 F.2d 1268 (2d Cir. 1988) 16 n.4

United States v. Granberry, 908 F.2d 278 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991) . . . . . *passim*

United States v. Ianniello, 677 F. Supp. 233 (S.D.N.Y. 1988) 16 n.4

United States v. Kato, 878 F.2d 267 (9th Cir. 1989) . . . . . *passim*

United States v. Krout, 66 F.3d 1420 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 963 (1996) 11

United States v. Loney, 959 F.2d 1332 (5th Cir. 1992) 9

United States v. Lopez, 514 U.S. 549 (1995) 18

United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) 16

United States v. Martinez, 905 F.2d 709 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990) 8, 13

United States v. Murphy, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988) . . . . . *passim*

United States v. Novod, 923 F.2d 970 (2d Cir.), *cert. denied*, 500 U.S. 919 (1991) 12-13

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991) 13, 15 n.3

United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991) . . . . . *passim*

United States v. Slay, 717 F. Supp. 689 (E.D. Mo. 1988) 16 n.4

United States v. Vario, 943 F.2d 236 (2d Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992) 19

STATUTES:

18 U.S.C. § 1341 2-3
18 U.S.C. § 1346 . . . . . *passim*
18 U.S.C. § 1955 5
18 U.S.C. § 3231 5
28 U.S.C. § 1291 7

SUPREME COURT RULES:

Rule 13.3 2

OTHER AUTHORITIES:

Note, *License Procurement and the Federal Mail Fraud Statute*, 58 U. Chi. L. Rev. 1125 (1991) 17, 18

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Anthony J. Tusa, Jr., and Victor J. Tusa, Sr., respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 14, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 110 F.3d 1131 (5th Cir. 1997) and is reproduced at Pet. App. A, *infra*, 1a-31a. The order of the Fifth Circuit denying rehearing is unreported and is reproduced at Pet. App. B, *infra*, 33a-34a. A pertinent order of the United States District Court for the Eastern District of Louisiana is unreported and is reproduced at Pet. App. C, *infra*, 35a-40a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on April 14, 1997. A timely suggestion for rehearing en banc was treated as a petition for rehearing and denied by the court of appeals on May 27, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Supreme Court Rule 13.3.

STATUTORY PROVISIONS INVOLVED

1. The mail fraud statute, 18 U.S.C. § 1341, provides:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything

> represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

This petition presents an important question of federal criminal law on which the federal courts of appeals are in open disagreement: whether, under the mail and wire fraud statutes, obtaining a license from a government authority to engage in a particular business activity is a scheme to deprive that authority of "property" within the meaning of this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). In this case, the Fifth Circuit, siding with the First and Third Circuits and disagreeing with the Second, Sixth, Seventh, Eighth, and Ninth Circuits, held that such a scheme

falls within the mail fraud statute — a holding essential to the court's affirmance of the petitioners' convictions. As this case demonstrates, this issue is a recurring one that has not been resolved by Congress's post-*McNally* enactment of 18 U.S.C. § 1346. This Court should grant certiorari to resolve the issue and restore uniformity to the enforcement of important federal criminal statutes.

1. Factual Background

The petitioners, Anthony J. Tusa, Jr., and Victor J. Tusa, Sr., are successful New Orleans businessmen who, until this case, had no criminal history and had never been linked with organized crime. Among their businesses was a company called Bayou Casino, which owned and operated video poker machines. As required by Louisiana law, the Tusas had obtained licenses from the relevant state authority, the Video Gaming Division of the Louisiana State Police.

Bayou Casino had business dealings with two other companies, Worldwide Gaming of Louisiana and Louisiana Route Operators, which were also licensed to engage in video poker activities in Louisiana. According to the government's evidence in this case, those companies were fronts for the Marcello and Gambino organized crime families, which allegedly intended to divert funds from the companies to their own uses. In obtaining their licenses, Worldwide Gaming and Louisiana Route Operators did not disclose that they were linked to organized crime.

2. The District Court Proceedings

The government brought a multi-count indictment in the United States District Court for the Eastern District of Louisiana against a number of persons alleged to be figures in the Marcello and Gambino organized crime families,

charging them with a variety of crimes including RICO offenses, mail fraud, wire fraud, and operation of an illegal gambling business in connection with the operations of Worldwide Gaming and Louisiana Route Operators. The district court's jurisdiction rested on 18 U.S.C. § 3231.

The Tusas were also named as defendants to four counts of the indictment, three of which charged them with mail fraud and one with operating an illegal gambling business in violation of 18 U.S.C. § 1955. The mail fraud counts charged that Bayou Casino, like Worldwide Gaming and Louisiana Route Operators, was dominated by organized crime, and that the Tusas had obtained video gambling licenses for Bayou Casino through fraudulent concealment of this alleged link to organized crime.

A number of defendants, including the Tusas, moved to dismiss the mail fraud charges on the ground that they did not properly charge an offense under the mail fraud statute, because they did not allege that the defendants had schemed to deprive the state of any "property" within the meaning of this Court's decisions in *McNally* and *Carpenter*. The district court denied the motions. The court noted that there was a conflict among the circuits over whether licenses are property for purposes of the mail fraud statute, but sided with those decisions holding that they are. The court reasoned that "*licensees* have a protected property interest" and that a license is "'something of value' *when in the hands of the licensee*." Pet. App. 38a-39a (emphasis added).

While the motions to dismiss were pending, the district court indicated that it had, *sua sponte*, decided to empanel an anonymous jury. When the defendants objected, the government responded with a motion requesting an anonymous jury. The motion contended that certain defendants (in particular, the Gambino family members)

would pose a threat to the jurors, and that the government had confidential information concerning possible jury tampering by one or more defendants. Over the defendants' opposition, the district court received the government's confidential information *in camera* and *ex parte*. The court then granted the motion for an anonymous jury.

Shortly thereafter, most of the defendants pleaded guilty, leaving only the Tusas and two codefendants, Sebastian Salvatore and Kenneth Jowaiszas. Because the defendants whose organized crime membership created the concerns expressed in the government's motion for an anonymous jury were no longer included, the remaining defendants moved for reconsideration of the anonymous jury issue. The government opposed the motion, and made another *in camera, ex parte* presentation focusing on Jowaiszas. The court denied reconsideration, and Jowaiszas pleaded guilty, leaving only the Tusas and Salvatore to go to trial before the anonymous jury.

At trial, the government attempted to establish the Tusas' knowledge of the organized crime involvement of Worldwide Gaming and Louisiana Route Operators primarily through the testimony of a former codefendant who had become a cooperating witness and an FBI agent who "interpreted" otherwise innocuous intercepted conversations. The government's theory was that the Tusa's fraud was failing to disclose to Louisiana authorities their dealings with Louisiana Route Operators and the organized crime affiliation of that company. The Tusas presented contrary evidence, including their own testimony that they were unaware of any organized crime involvement by anyone with whom they did business.

The jury acquitted the Tusas of the illegal gambling charge but convicted them on the mail fraud counts. The

district court sentenced each of the Tusas to ten months' imprisonment, a fine of $11,838, and restitution of $37,048. Codefendant Salvatore, who had no dealings with the Tusas, was convicted on all counts charging him.

3. The Fifth Circuit's Opinion

The Tusas and Salvatore appealed their convictions, and the Fifth Circuit (which had jurisdiction under 28 U.S.C. § 1291) affirmed. Addressing sufficiency of the evidence, the court acknowledged evidence cited by the Tusas that they "operated a legitimate business," but, "accept[ing] all reasonable inferences in the light most favorable to the verdict," the court found the evidence sufficient to support the convictions. Pet. App. 6a. Although the court recognized that the evidence did "not rule out the Tusas' contention that they engaged in arms-length, legitimate business negotiations" with the reputed mob figures, the court concluded that "a reasonable jury could have believed that the Government proved beyond a reasonable doubt that the Tusas committed the essential elements of mail fraud." Pet. App. 7a.

Turning to the question whether the government had properly alleged and proved a scheme to defraud another of money or property under the mail fraud statute, the court noted that whether "licenses are money or property for the purposes of the mail fraud statute is an issue of first impression in this Circuit." It went on to hold "that video poker licenses do constitute money or property as required to support a mail fraud conviction." Pet. App. 11a.

The court recognized that, as interpreted by this Court in *McNally v. United States* and *Carpenter v. United States*, "the mail fraud statute protects property rights." Pet. App. 11a. Although the court observed that Congress had

"narrowed the impact of *McNally* by enacting 18 U.S.C. § 1346," which extends the mail and wire fraud statutes to include schemes to "deprive another of the intangible right of honest services," the court recognized that there was no allegation or proof of any deprivation of the right to honest services, and accordingly stated that "we do not affirm the Appellants' convictions on the grounds that they deprived Louisiana of its right to honest services." Pet. App. 14a, n.1. Thus, the court held, "in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder." Pet. App. 12a (citing *McNally*, 483 U.S. at 358, n.8).

The court acknowledged that the Second, Sixth, Seventh, Eighth, and Ninth Circuits had held that "state-issued licenses are not property for the purposes of the mail fraud statute." Pet. App. 12a (citing *United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir. 1991); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989); *United States v. Dadanian*, 856 F.2d 1391 (9th Cir. 1988)). On the other hand, the court pointed out, the First and Third Circuits had held that "licenses constitute property for the purposes of the mail fraud statute." Pet. App. 12a (citing *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993); *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990)). Stating that "[w]e agree with the First and Third Circuits," Pet. App. 13a, the court rejected the reasoning and results of the circuits holding that unissued licenses are not property in the hands of the state

and that a scheme to obtain a license therefore is not a scheme to defraud the state of property.

The court began by defining property as "something of value," or as "a legal 'bundle of rights' that one possesses in connection with a particular object." Pet. App. 13a-14a (quoting *United States v. Loney*, 959 F.2d 1332, 1336 (5th Cir. 1992), and *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991)). Such rights, the court continued, "[n]ecessarily encompassed . . . in the case of licenses, the right to control their issuance." Pet. App. 14a (citing *United States v. Bucuvalas*, 970 F.2d at 945). Thus, Louisiana's "right to control the licenses" was property, and the Tusas conduct fell within the mail fraud statute because "Louisiana was stripped of its right to bestow the video poker licenses on those parties meeting its criteria." Pet. App. 15a.

The court recognized that its reasoning was contrary to that of courts holding that, while an issued license may be valuable "property" of the licensee, an *unissued* license is not "property" in the hands of the state. Pet. App. 15a (citing *United States v. Granberry*, 908 F.2d at 280, *United States v. Kato*, 878 F.2d at 269; and *United States v. Murphy*, 836 F.2d at 253-54). The court rejected this distinction as "esoteric," and criticized decisions relying on it for "provid[ing] no justification whatsoever for making the distinction." Pet. App. 15a. Conceding the possibility that the distinction rested on "the reasoning that an issued license has great value in the hands of the licensee but an unissued license has negligible value in the hands of the government," the court derided such a view as resting on "questionable logic." Pet. App. 15a-16a.

Having disagreed with the holdings and reasoning of decisions holding that an unissued license is not property, the court proceeded also to reject decisions of other circuits that

it characterized as resting on the argument that a state "has only a regulatory interest, and not a property interest," in licenses it issues. Pet. App. 17a (citing *United States v. Schwartz*, 924 F.2d at 417; *Toulabi v. United States*, 875 F.2d at 125). The court denied the application of this principle to the case before it on the ground that Louisiana's issuance of video poker licenses entitled it to significant fees from the licensees, which the court concluded transformed its regulatory interest into a property interest. The court analogized the case to *Borre v. United States*, 940 F.2d 215, 221 (7th Cir. 1991), in which the Seventh Circuit held that a cable television *franchise* — as opposed to a license — is a property interest under the mail fraud statute.

After disposing of the mail fraud issue, the court addressed the use of an anonymous jury. Although calling this step a "drastic measure" to be "utilized only in limited circumstances" where there are "more than mere allegations or inferences of potential risk," the court nonetheless held the trial court's decision to use such a jury was entitled to "substantial deference" and subject to "review only for abuse of discretion." Pet. App. 22a. The court applied a broad "totality of the circumstances" test under which factors including but not limited to (1) a defendant's involvement in organized crime, (2) his participation in a group with the capacity to harm jurors, (3) his past attempts to interfere with the judicial process, (4) his potential exposure to lengthy incarceration, and (5) extensive publicity, "may justify impanelment of an anonymous jury." Pet. App. 22a-23a.

Applying this test, the court upheld use of the anonymous jury not on the basis of the *ex parte* information relied on by the district court, but primarily on the basis of the potential danger posed to jurors by the organized crime figures who were formerly codefendants but pleaded guilty

before trial. Pet. App. 23a. Though there was no evidence that the defendants who actually went to trial posed a danger to the jury, the court held that mere association of the Tusas and Salvatore with such persons justified jury anonymity, because "evidence linking defendants to organized crime 'alone can . . . translate into the requisite showing for the empanelment of an anonymous jury.'" Pet. App. 24a (quoting *United States v. Krout*, 66 F.3d 1420, 1427, n.7 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 963 (1996)). The court further stated that there had been "extensive" publicity about the case and that the Tusas and Salvatore had potentially been subject to significant prison terms, even though they had received minimal sentences. Pet. App. 24a. Finally, the court stated that use of the anonymous jury had not prejudiced the defendants, because they were afforded extensive voir dire, and because the jury had received a "plausible" and "nonprejudicial" explanation for anonymity that did not detract from the presumption of innocence.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS ON THE "LICENSE AS PROPERTY" ISSUE UNDER THE MAIL FRAUD STATUTE

The Fifth Circuit's opinion correctly recognizes that a scheme to obtain a license from a government authority through deception can support a prosecution under the federal mail or wire fraud statutes only if, in obtaining the license, the defendant deprived the government of "property." As the Fifth Circuit forthrightly acknowledges, its holding that an unissued license in the hands of the government is property, though consistent with rulings of the

First and Third Circuits, is directly contrary to decisions of the Second, Sixth, Seventh, Eighth, and Ninth Circuits.

The Fifth Circuit's holding is squarely at odds with the Sixth Circuit's ruling in *United States v. Murphy*, that a "license may well be 'property' once issued, insofar as the [licensee] is concerned, but certainly an unissued certificate of registration is not property of the State . . . and once issued, it is not the property of the State . . . ." 836 F.2d at 253-54. The ruling below is equally incompatible with the Eighth Circuit's holding, in *United States v. Granberry*, that "[a] governmental permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interest in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under Section 1341." 908 F.2d at 280. [1]

The Fifth Circuit's decision is also directly contrary to the Ninth Circuit's rulings in *United States v. Dadanian*, which held that a "scheme to obtain [a] gambling license did not affect the [licensing body's] interests as a property-holder," 856 F.2d at 1392, and *United States v. Kato*, which held that a scheme to obtain a pilot's license "did not affect the government's interests as a property holder" because the government had no property interest in an unissued license. 878 F.2d at 269. Similarly incompatible with the decision in this case is the Second Circuit's decision in *United States v. Schwartz*, in which that court agreed that "an unissued license does not constitute property in the hands of the government for federal fraud statute purposes." 924 F.2d at 417; *see also id.* at 418. The Second Circuit subsequently adhered to this rule in *United States v. Novod*, 923 F.2d 970

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[1] The Eighth Circuit recently reaffirmed its adherence to this principle in *United States v. Blumeyer*, 114 F.3d 758, 766-67 (8th Cir. 1997).

(2d Cir.), *cert. denied*, 500 U.S. 919 (1991), and *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991). The Seventh Circuit, too, has held — contrary to the Fifth Circuit's ruling here — that while a "license may be property from the [licensee's] perspective," obtaining a license does not deprive the government of property, because there is no property interest in unissued licenses. *Toulabi v. United States*, 875 F.2d at 125.

In disagreeing with this body of caselaw, the Fifth Circuit endorsed decisions of the Third and First Circuits, *United States v. Martinez* and *United States v. Bucuvalas*, both of which had expressly disagreed with the reasoning and results of the decisions of the Second, Sixth, Seventh, Eighth, and Ninth Circuits. *See Martinez*, 905 F.2d at 714 ("We see no reason to make the esoteric distinction between an unissued and issued license which underlies the *Murphy*, *Kato* and *Dadanian* opinions."); *Bucuvalas*, 970 F.2d at 944-45.

The Fifth Circuit's principal rationale for rejecting the decisions holding that unissued licenses are not property of the state is directly contrary to the reasoning of opinions from other circuits. The Fifth Circuit grounded its holding in the notion that the government's "right to control" the issuance of licenses gave it a property interest in those licenses. Pet. App. 14a. But the "right to control" theory was expressly rejected by the Sixth Circuit in *Murphy*, because, under *McNally* and *Carpenter*, such an intangible right, not attached to any interest traditionally recognized as a property interest, is outside the scope of the mail fraud statute. *See* 836 F.2d at 253. Similarly, the Second and Seventh Circuits have held that a governmental "right to control" the granting of licenses is not a property interest. *United States v. Evans*, 844 F.2d 36, 40-41 (2d Cir. 1988);

United States v. F.J. Vollmer & Co., 1 F.3d 1511 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994).

The clear and acknowledged conflict among the circuits on this issue is in no way ameliorated by the Fifth Circuit's effort to "distinguish" a part of the reasoning of the conflicting Second and Seventh Circuit decisions in *Schwartz* and *Toulabi*. The Fifth Circuit's disagreement with the application of the logic of those decisions rested on its assertion that because the state of Louisiana received fees from its licensees, the state had a property interest, and not merely a "regulatory interest," in the issuance of the video poker licenses. But as the Fifth Circuit recognized, its analysis on this point did not distinguish those contrary opinions (such as *Murphy*, *Granberry*, and *Kato*) that were based on the proposition that unissued licenses are not property; the court's discussion addressed only one line of reasoning that it found in the opinions in *Schwartz* and *Toulabi* — namely, the reasoning that the state's interest in whether to grant permission to a private party to engage in an activity is a regulatory rather than a property interest.

Even as to *Schwartz* and *Toulabi*, the Fifth Circuit's attempted distinction is illusory, since governmental regulators regularly receive fees from licensees, and nothing in *Schwartz* or *Toulabi* suggests that their analysis would be affected in any way by the fact that the licensing authority received such fees. [2] Indeed, that the issuance of a license

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[2] The Fifth Circuit's reliance in this regard on the Seventh Circuit's opinion in *Borre v. United States* does not serve to reconcile its result with the Seventh Circuit's decisions in *Toulabi* or *F.J. Vollmer*, for *Borre* was based on an exacting analysis of the extensive differences between a *franchise* and a license. *See* 940 F.2d at 219-221. The court relied in large part on the fact that Illinois law had long recognized a franchise as a property interest, as well as on particular features of franchises that supported the proposition that a franchise, unlike a license, is property in the hands of the issuing

results in the state's receiving fees is hardly an answer to the argument that the issuance of the license does not *deprive the government of property that it had before the license issued*. If anything, it suggests that the government *acquired* money or property through the licensing process. [3]

Ultimately, the Fifth Circuit's decision must stand or fall on its holding that the state's "right to choose the persons to whom it issues video poker licenses" is a property right. Pet. App. 15a. That holding, while consistent with the law of the First and Third Circuits, could not stand in the Second, Sixth, Seventh, Eighth or Ninth.

II.

THE ISSUE IS RECURRING, AND THE CONFLICT IS PERSISTENT

Since *McNally* and *Carpenter*, the question whether allegations that defendants schemed to obtain licenses from government authorities are cognizable under the mail fraud statute has surfaced repeatedly in the federal courts. In addition to the cases in the courts of appeals cited above, the issue has been addressed in many other published decisions at both the district court and court of appeals levels, with

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government authority (for example, a franchise typically is exclusive and may be operated by the government entity itself). *See id.*

[3] This case is thus unlike those in which the Second and Eighth Circuits have held that when an application for a license is part of a scheme to deprive a victim of money, a mail fraud charge may be proper even though the license itself is not property. *See United States v. Paccione*, 949 F.2d at 1193-97; *United States v. Blumeyer*, 114 F.3d at 767.

disparate results reflecting the circuits' disagreement. [4] The opinions show no signs of converging on a common position: indeed, they openly disagree. Given the well-known propensity of federal prosecutors to make broad use of the mail fraud statute (*see, e.g., United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting), *cert. denied*, 461 U.S. 913 (1983)), the pervasiveness of licensing requirements, and the frequency of disputes over whether persons subject to government regulation have fully and accurately disclosed facts to regulators, it is evident that the issue will continue to make regular appearances in federal court.

The persistence of this issue is unaffected by 18 U.S.C. § 1346, passed in *McNally*'s wake. Section 1346 provides that under the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Section 1346 may overrule *McNally*'s result, *but only where the government alleges and proves that a mail or wire fraud scheme is aimed at depriving the victim of its entitlement to "honest services"* — for example, cases involving bribery of a public official. *See, e.g., United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc).

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[4] *See, e.g., United States v. Cleveland*, 951 F. Supp. 1249 (E.D. La. 1997); *United States v. Ferrara*, 701 F. Supp. 39, (E.D.N.Y.), *aff'd mem.*, 868 F.2d 1268 (2d Cir. 1988); *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1988); *United States v. Dray*, 901 F.2d 1132 (1st Cir.), *cert. denied*, 498 U.S. 895 (1990); *United States v. Ianniello*, 677 F. Supp. 233 (S.D.N.Y. 1988); *McEvoy Travel Bureau v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir.), *cert. denied*, 498 U.S. 992 (1990); *Mylan Labs. v. AKZO*, 770 F. Supp. 1053 (D. Md. 1991), *rev'd on other grounds*, 7 F.3d 1130 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994). *See also United States v. DeFries*, 43 F.3d 707, 710 & n.2 (D.C. Cir. 1995) (noting conflict among circuits over the issue).

There was no such allegation or proof in this case, and the Fifth Circuit expressly disclaimed reliance on § 1346.

Indeed, this case demonstrates that § 1346 does not resolve the conflict among the circuits over whether allegedly fraudulent acquisition of a license is a deprivation of property under the mail and wire fraud statutes when the alleged scheme does not involve corruption of public officials. In the garden-variety licensing case in which the alleged fraud consists simply of misrepresenting facts to public officials, as opposed to corrupting them, § 1346 has no effect. Thus, as the Fifth Circuit recognized, cases such as this one continue to present the question whether the issuance of a license deprives the issuing body of property within the meaning of *McNally* and *Carpenter*. *See* Note, *License Procurement and the Federal Mail Fraud Statute*, 58 U. Chi. L. Rev. 1125, 1130-31 (1991).

III.

THE ISSUE MERITS REVIEW BY THIS COURT

A conflict among the circuits over the substantive scope of one of the most important and widely used federal criminal statutes is by nature one that calls for resolution by this Court. In this case, the Tusas face fines and incarceration for actions that, in five circuits embracing 26 states, *would not be a federal crime*. In three circuits covering ten states, by contrast, such actions are criminal, while four circuits comprising fourteen states and the District of Columbia have yet to choose sides. The reach of federal criminal law, and the liberty interests of affected citizens, should not be subject to such accidents of geography.

The issue also implicates significant interests of federalism. The effect of the Fifth Circuit's decision is to

criminalize state licensing matters — matters that are, by definition, already subject to elaborate schemes of state-law regulation and enforcement. Federal law should not lightly be read to supplement or supplant such matters of state governance — whether by penalizing actions that are already criminal under state law or by criminalizing actions that the state has chosen not to classify as crimes. *See McNally*, 483 U.S. at 360, 361 n.9; *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

Finally, the decision below violates principles of lenity and clear statement in criminal statutes (*see, e.g., United States v. Aguilar*, 515 U.S. 593 (1995)) by bringing within the mail fraud statute conduct that it was not designed to cover. As *McNally* held, the purpose of the mail fraud statute is "protecting property rights." 483 U.S. at 357. Although Congress has subsequently expanded that purpose to include as well protection of the "right of honest services," 18 U.S.C. § 1346, outside this new area of coverage, the concerns that prompted this Court's decision in *McNally* — in particular, the concern that the statute not be construed "in a manner that leaves its outer boundaries ambiguous," 483 U.S. at 360 — remain intact.

The Fifth Circuit's holding subverts these principles by requiring not proof of a scheme aimed at depriving a licensing authority of some property that it already possessed, but rather simply proof that the defendant sought to deprive the government of its "right to control" the regulation of private conduct — a classic, intangible, *non-property* right. In characterizing the licensing authority's interest in such cases as a "property right," the Fifth Circuit has joined those courts that have "fallen victim to the post-*McNally* 'creative property' phenomenon." Note, *License Procurement and the Federal Mail Fraud Statute*, 58 U. Chi. L. Rev. at 1132. The maintenance of proper bounds to

federal criminal law requires that such "creative" interpretations be eschewed.

IV.

THE FIFTH CIRCUIT'S AFFIRMANCE OF THE USE OF AN ANONYMOUS JURY IN THIS CASE ALSO DESERVES REVIEW BY THIS COURT

In addition to the issue dividing the courts of appeals over the proper application of the mail fraud statute in licensing cases, this case also presents a substantial and important issue as to the correctness of the Fifth Circuit's affirmance of the use of an anonymous jury. Affording great deference to the district court's use of this extraordinary device, the Fifth Circuit, without even considering the *ex parte* submissions on which the district court actually relied, upheld the use of an anonymous jury based on little more than the existence of evidence connecting the defendants to other persons involved in organized crime.

As set forth in a petition for certiorari being filed contemporaneously by the Tusas' codefendant, Sebastian Salvatore, the Fifth Circuit's decision departs from principles applied by other courts (in particular, the Second Circuit's decision in *United States v. Vario*, 943 F.2d 236 (2d Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992)) and gives insufficient weight to the interests of defendants. For the convenience of the Court, the Tusas adopt and incorporate by reference the reasons for granting the writ presented in codefendant Salvatore's petition on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 1997

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-30221

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SEBASTIAN SALVATORE, also known as Buster, also known as Harry,
ANTHONY JOSEPH TUSA, JR., also known as A.J.,
VICTOR JOSEPH TUSA, SR., also known as Vic,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

April 14, 1997

Before DUHE, BENAVIDES and STEWART, Circuit Judges.

DUHE, Circuit Judge:

Anthony Tusa, Victor Tusa, and Sebastian Salvatore appeal their convictions arising from their participation in a scheme to operate certain organized crime-controlled companies that circumvented the licensing requirements of Louisiana's Video Draw Poker Devices Control Law. For reasons that follow, we affirm.

BACKGROUND

In 1991, Louisiana enacted the "Video Draw Poker Devices Control Law" (hereinafter "the Video Poker Law" or "the Act"), which legalized video poker machines in Louisiana subject to the terms of the Act. *See* La. R.S. 33:4862.1 *et seq.* (recodified at La. R.S. 27:301-:324 (West Supp. 1997)). To operate in the State, all video poker machine manufacturers, distributors, and owners must be licensed. *See id.* at 33:4862.11 (recodified at La. R.S. 27:311). To be licensed, each applicant must satisfy certain "suitability" criteria, which provide that no license will be issued to any person convicted of certain criminal offenses, and which require each applicant to be a person of good character who does not pose a threat to the public interest. See id. at 33:4862.10(A)-(B) (recodified at La. R.S. 27:310(A)-(B)). The Act also creates a continuing duty on the part of all licensees to inform the Video Gaming Division of the Louisiana State Police--the agency charged with overseeing the video poker industry--of any facts that they believe would be a violation of the Video Poker Law. *See id.* at 33:4862.10(C) (recodified at La. R.S. 27:310(C)).

The Appellants, and fourteen co-defendants, were indicted for operating a criminal enterprise that subverted the licensing requirements of Louisiana's Video Poker Law. The purpose of the enterprise was to own and operate organized crime-controlled companies engaged in the video poker industry. To this end, certain of the co-defendants known to be involved in organized crime conspired with apparently legitimate "front men" or "straw men," who obtained video poker licenses from Louisiana by intentionally concealing the presence of organized crime from the Video Gaming Division. Once established and licensed, these "front companies" obtained funding and purchased video poker machines from Bally Gaming, Inc. ("Bally Gaming"), a licensed video poker machine manufacturer. Thereafter, the enterprise sought to "skim, divert, and steal" funds collected by these crime-controlled companies and to funnel such money to associates of New Orleans-based and New York-based organized crime families.

The heart of the Government's case-in-chief consisted of the testimony of Christopher Tanfield and FBI Agent Richard McHenry. Tanfield, a cooperating co-defendant, provided an inside view of the business side of the criminal enterprise. Agent McHenry, the primary case agent, testified to the meaning of numerous conversations and the identity of individuals covertly recorded by an FBI microphone, telephone wiretap, and video camera, all hidden inside Frank's Deli on Decatur Street, a primary meeting spot of the conspirators.

Tanfield testified that he and Steven Bolson, another co-defendant who pleaded guilty, incorporated and operated two businesses known as Worldwide Gaming of Louisiana, Inc. ("Worldwide Gaming") and Louisiana Route Operators, Inc. ("LRO" or "Louisiana Route Operators"). Worldwide Gaming was licensed to sell and distribute video poker

machines in Louisiana. LRO was licensed as a route operator company, meaning that it could own video poker machines, place the machines in businesses, and receive revenues from the operation of the machines. As apparently legitimate "front men," Tanfield and Bolson, initially designated as vice-president and president of Worldwide Gaming and LRO, respectively, obtained licenses for these companies from the Video Gaming Division by deliberately concealing the fact that the companies were, in reality, fronts for organized crime. Tanfield described his dealings with individuals associated both with the New Orleans-based Marcello crime family, including Anthony Carollo (the "boss" of the family), Joseph Marcello, Jr., Frank Gagliano, Sr., Joseph Gagliano, and Sebastian Salvatore, and with the New York-based Gambino crime family, including Joseph Corozzo and John Gammarano. All of these individuals were co-defendants of the Appellants who pleaded guilty before the Appellants' trial.

Through Worldwide Gaming and LRO, Tanfield and Bolson operated under the direction of organized crime as wholesalers in the video poker industry. After buying video poker machines and borrowing money from Bally Gaming, Worldwide Gaming and LRO would then sell these machines to and participate in the routes of certain businesses in Louisiana. Money thus received by Worldwide Gaming and LRO was then funneled to organized crime. One of the businesses with which Tanfield dealt was Bayou Casino Inc. ("Bayou Casino"), the route operator company owned and operated by Victor and Anthony Tusa. As outlined below, Tanfield repeatedly inculpated the Tusas and Salvatore in the criminal enterprise.

Before trial, all of the indicted co-defendants, except for the three Appellants, pleaded guilty to various federal offenses. The Appellants proceeded to trial and were

convicted. Anthony and Victor Tusa were each convicted of mail fraud, 18 U.S.C. § 1341 (counts 12-14). Sebastian Salvatore was found guilty of violating the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962 (count 1); conspiracy to violate the RICO Act, 18 U.S.C. § 1962 (count 2); mail fraud, 18 U.S.C. § 1341 (counts 3-7, 9-10); conducting an illegal gambling business, 18 U.S.C. §§ 1955 (counts 8, 11); wire fraud, 18 U.S.C. § 1343 (counts 16-31); and interstate travel and communication in aid of racketeering, 18 U.S.C. § 1952 (count 37). The Tusas were each sentenced to 10 months incarceration on all counts to run concurrently, and each was ordered to pay restitution of $37,048 and a fine of $11,838. Salvatore was sentenced to 18 months incarceration on all counts to run concurrently, and was ordered to pay restitution of $25,000.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

A. *Standard of Review*

A criminal conviction must be upheld if any rational jury could have found that the evidence established the essential elements of the crimes charged beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *United States v. Ismoila*, 100 F.3d 380, 387 (5th Cir. 1996). We view the evidence, including all reasonable inferences drawn therefrom and all credibility determinations, in the light most favorable to the jury verdict. *See United States v. Resio-Trejo*, 45 F.3d 907, 910 (5th Cir. 1995). The evidence need not exclude every reasonable hypothesis of innocence, *see United States v. McCord*, 33 F.3d 1434, 1439 (5th Cir. 1994), but if the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory

of innocence," the conviction must be reversed. *United States v. Salazar*, 66 F.3d 723, 728 (5th Cir. 1995).

B. *The Tusas*

To sustain the Tusas' mail fraud convictions, the Government had to prove: (1) the existence of a scheme to defraud, (2) the use of the mails to execute the scheme, and (3) the specific intent on the part of the defendants to commit fraud. *See United States v. Fagan*, 821 F.2d 1002, 1008 (5th Cir. 1987). The Tusas assert that they were legitimate businessmen operating within the confines of the Video Poker Law, and they maintain that the Government did not establish that Bayou Casino was controlled by organized crime. Accordingly, they contend that the Government failed to establish that they had the specific intent to defraud. The Tusas repeatedly draw exculpatory inferences from the evidence purportedly showing that they operated a legitimate business, but we must accept all reasonable inferences in the light most favorable to the verdict. *See Resio-Trejo*, 45 F.3d at 910. Doing so, we conclude that the evidence was sufficient to support the Tusas' mail fraud convictions.

In establishing that Bayou Casino, the Tusas' video poker route operator company, was controlled by organized crime, the Government relied primarily upon the testimony of Christopher Tanfield and the audiotapes of numerous inculpatory conversations between the Tusas and other co-defendants recorded by the Government microphone and telephone wiretap hidden at Frank's Deli. Tanfield's testimony establishes that organized crime did have significant control over Bayou Casino, and it is undisputed that the Tusas did not inform the Video Gaming Division of such control, as required by the Video Poker Law. Specifically, Tanfield testified that Joseph Marcello Jr. both instructed Tanfield to give the Tusas preferential treatment

and also mediated disputes that arose between the Tusas and other companies involved in the enterprise. In addition, Tanfield testified that Bayou Casino eventually (in November 1992) became a front company for organized crime.

Tanfield's testimony was supported by the audiotaped conversations and FBI Agent Richard McHenry's testimony regarding those conversations. Although the actual text of the taped conversations was at times seemingly innocuous, Agent McHenry testified extensively as to the meaning of the conversations and "interpreted" them for the jury. The tapes, and Agent McHenry's testimony regarding the tapes, establish that the Tusas dealt extensively with Carollo, Marcello, and the Gaglianos; that the Tusas believed these people to be involved in the operation and control of Worldwide Gaming and LRO; and that Carollo, Marcello, and the Gaglianos had some degree of control over Bayou Casino. Although the tapes do not rule out the Tusas' contention that they engaged in arms-length, legitimate business negotiations with Tanfield, Bolson, Carollo, Marcello, and the Gaglianos, it is also reasonable to draw, as the jury did, more inculpatory inferences from the tapes. See McCord, 33 F.3d at 1439.

Upon reviewing the evidence in the light most favorable to the verdict, we conclude that a reasonable jury could have believed that the Government proved beyond a reasonable doubt that the Tusas committed the essential elements of mail fraud.

C. *Salvatore*

Salvatore was convicted of RICO, RICO conspiracy, mail fraud, wire fraud,interstate travel and communication in aid of racketeering, and conducting an illegal gambling business. Salvatore assumes that his convictions on the

substantive offenses were based upon co-conspirator liability under *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), and he therefore addresses the sufficiency of the evidence as it relates to his conviction for RICO conspiracy only. Although Salvatore admits to attending meetings with the members of the Marcello crime family, he contends that the evidence regarding these meetings merely establishes his presence, and not his participation in the conspiracy.

To satisfy the intent requirement of conspiracy, the Government must prove that a defendant knew of the conspiracy and voluntarily joined it, and that a defendant had the requisite intent to commit the underlying substantive offenses. *See Ismoila*, 100 F.3d at 387. We will not readily infer a defendant's knowledge of and decision to join a conspiracy, and a defendant's mere association with a conspirator is not by itself sufficient to sustain a conspiracy conviction. *See United States v. Ross*, 58 F.3d 154, 159 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 404, 133 L. Ed. 323 (1995).

As with the Tusas, much of the Government's proof is based upon the testimony of Christopher Tanfield. Tanfield testified that Salvatore was present, along with co-defendants Anthony Carollo, Joe Marcello, the Gaglianos, John Gammarano, and Joseph Corozzo, at a meeting in late 1991 in which the conspirators decided to allocate the profits from the video poker enterprise to the New York crime family, the New Orleans crime family, and to individuals such as Tanfield and Bolson to raise capital for the scheme. Tanfield also testified that Salvatore was present at a December 1992 meeting where the conspirators discussed moving LRO's assets to other front companies to prevent Bally Gaming from foreclosing on LRO.

In addition, Tanfield described how money from Worldwide Gaming and LRO was to be shifted into offshore banks from which the conspirators, including Salvatore, could withdraw funds by means of debit cards so that the profits from Worldwide Gaming could be funneled to members of the conspiracy in away that was non-traceable. He testified that Joe Gagliano told him that Salvatore "was going to get a piece of the deal," meaning, in Tanfield's opinion, that Salvatore was "going to get one of these credit cards."

Agent McHenry's testimony concerning the audiotaped conversations bolstered Tanfield's inculpatory testimony regarding Salvatore's participation in the criminal enterprise. Agent McHenry testified that the tapes reflected that after Anthony Carollo was hospitalized with a heart attack, John Gammarano decided that should anything further happen to Carollo, the conspirators should talk to either Joe Marcello or Sebastian "Buster" Salvatore. McHenry also testified that after Bally Gaming delivered the video poker machines to Worldwide Gaming, Salvatore and the other co-defendants were given a private tour of the Worldwide Gaming facility. The Government also introduced a recording of a phone conversation between Joe Gagliano and Salvatore wherein Gagliano tells Salvatore, "They're here," and Salvatore responds, "All right. I'll be there in about 20 minutes." Agent McHenry testified that the FBI's video surveillance reflected that this call was placed shortly after co-defendants Gammarano and Corozzo of the New York-based Gambino family arrived at Frank's Deli. The tapes also reflect that, on at least three other occasions, Salvatore was informed that the conspirators were at the Deli and was told that his presence was requested there. In addition, the jury heard a tape of a phone conversation between Carollo and Salvatore in which Carollo told Salvatore to meet him at an unnamed school, which Agent

McHenry identified as the RETS Electronic Training Center in Metairie. The FBI's videotape surveillance confirmed that Salvatore was present at RETS that evening for the meeting in which the conspirators, according to Tanfield, discussed hiding LRO's assets from Bally. Agent McHenry also testified about a conversation recorded by the deli microphone wherein Salvatore was overheard discussing the scheme with his co-conspirators. Finally, the deli microphone picked up a conversation in which Joe Gagliano was describing to an unindicted co-conspirator an argument between Frank Gagliano Sr. (Joe's father) and Sebastian Salvatore. Referring to this conversation, Agent McHenry testified that "Joe Gagliano is expressing his frustration because members of the family have been hustling and trying to get this thing going with Worldwide Gaming and LRO for a year now, and Mr. Salvatore, obviously he's going to get his piece of it, but he hasn't maybe been living up to his end on putting it all together for them."

In conclusion, the Government proved beyond a reasonable doubt that Salvatore knew of the conspiracy and voluntarily joined it. Although establishing that a defendant merely associated with the conspirators is insufficient to prove membership in a conspiracy, *see United States v. Jackson*, 700 F.2d 181, 185 (5th Cir. 1983), Salvatore's repeated and requested presence at meetings in which the details of the conspiracy were discussed does confirm that he knew of the conspiracy and voluntarily joined it.

II. MAIL FRAUD

The indictment charged the Appellants with mail fraud for their participation in a scheme to defraud the State by fraudulently obtaining route operator and distributor licenses for their companies. The Appellants contend that their mail fraud convictions must be reversed because the

video poker licenses do not constitute "money or property" as required by the mail fraud statute, 18 U.S.C. § 1341. We review this issue of law *de novo*. *See United States v. Loney*, 959 F.2d 1332, 1334 (5th Cir. 1992). Whether video poker licenses are money or property for the purposes of the mail fraud statute is an issue of first impression in this Circuit, and for reasons that follow, we conclude that video poker licenses do constitute money or property as required to support a mail fraud conviction. The Supreme Court opinions in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), and *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 275 (1987) guide our decision. In *McNally*, the defendants were convicted of mail fraud for their participation in a "self-dealing patronage scheme [that] defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *McNally*, 483 U.S. at 352, 107 S. Ct. at 2877. The Supreme Court reversed the convictions, holding that although the mail fraud statute protects property rights, it "does not refer to the intangible right of the citizenry to good government." *Id.* at 356, 107 S. Ct. at 2879. The Court concluded that "any benefit which the Government derives from the [mail fraud] statute must be limited to the Government's interests as property holder." *Id.* at 358 n.8, 107 S. Ct. at 2881 n.8.

Shortly thereafter, the Supreme Court limited McNally, noting that the mail fraud statute protects intangible as well as tangible property rights. *See Carpenter*, 484 U.S. at 25, 108 S. Ct. at 320. In *Carpenter*, the defendants, a Wall Street Journal columnist and a securities broker, were convicted of mail fraud arising from the pre-publication release of confidential business information to be published in the Journal's "Heard on the Street" column. *See id.* at 22-24, 108 S. Ct. at 318. The

Court affirmed the mail fraud convictions, holding that "[c]onfidential business information has long been recognized as property," and that the defendants' scheme deprived the Journal of its intangible property right to keep the information confidential. *See id.* at 26-27, 108 S. Ct. at 320-21.

Although neither *McNally* nor *Carpenter* directly answer the question at issue, they teach that: in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder. *Cf. McNally*, 483 U.S. at 358 n.8, 107 S. Ct. at 2881 n.8.

Appellants rely upon a number of circuit court decisions holding that various state-issued licenses are not property for the purposes of the mail fraud statute. *See United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir. 1991) (arms export license); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator permit); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989) (pilot license); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxicab driver license); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988) (bingo license); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license). All of these decisions are based on one or both of the following rationales: (1) although issued licenses constitute property in the hands of the licensees, unissued licenses in the hands of the licensor are not property; and (2) the government has only a regulatory interest, and not a property interest, in its issuance of the licenses.

In response, the Government references two circuit court decisions holding that certain licenses constitute property for the purposes of the mail fraud statute. *See*

United States v. Bucuvalas, 970 F.2d 937, 945 (1st Cir. 1992) (liquor license); *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir. 1990) (medical license). Further, since this appeal was taken, another federal district court in Louisiana has held that video poker licences [sic] are property for purposes of the mail fraud statute. *See United States v. Cleveland*, 951 F. Supp. 1249, 1258 (E.D. La. 1997) (Vance, J.). These decisions all conclude that there is no relevant difference, for the purposes of the mail fraud statute, either between issued and unissued licenses, or between the government's regulatory interests and its property interests in the licenses at issue. We agree with the First and Third Circuits, and with Judges Clement and Vance of the Eastern District of Louisiana, that there is no justification for drawing a distinction between issued and unissued licenses, and we also agree that Louisiana has more than just a regulatory interest in the video poker licenses.

A. *The Legal "Bundle of Rights"*

We begin with the proposition that the concept of property rights should be given a broad interpretation for the purposes of the mail fraud statute. *See United States v. Loney*, 959 F.2d 1332, 1336 (5th Cir. 1992); *Murphy*, 836 F.2d at 253. Indeed, this Court has noted that property may be defined as "something of value." *See Loney*, 959 F.2d at 1336 (citing *McNally*, 483 U.S. at 358). Supreme Court precedent also supports this view. *See McNally*, 483 U.S. at 356, 107 S. Ct. at 2879-80 (noting that the phrase, "any scheme or artifice to defraud," must be "interpreted broadly insofar as property rights are concerned"); *Carpenter*, 484 U.S. at 26-27, 108 S. Ct. at 320-21 (holding that the Wall

Street Journal possessed a property right in the exclusivity of confidential business information).[1/]

More specifically, courts define property as a legal "bundle of rights" that one possesses in connection with a particular object. *See Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991). Included in this bundle of property rights are the rights "to possess, use and dispose" of a particular article. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 3175-76, 73 L. Ed. 2d 868 (1982). Necessarily encompassed within the right to use and dispose of an object is the right to control that object--and in the case of licenses, the right to control their issuance. *See Bucuvalas*, 970 F.2d at 945 (noting that the city of Boston had a property right in its ability to control the issuance of liquor licenses). "When we say that we own something, one of the things that we mean is that we can determine what to do with it. We can either keep it or transfer it to someone else. And we can choose those persons to whom we will transfer it." *Granberry*, 908 F.2d at 280. Indeed, *Carpenter* itself supports the position that the right to control is included in the bundle of rights known as "property," for in that case the Supreme Court held that the defendants defrauded the Wall

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[1/] In addition, Congress narrowed the impact of *McNally* by enacting 18 U.S.C. § 1346, which provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' [a term found in § 1341] includes a scheme or artifice to deprive another of the intangible right of honest services." Although we do not affirm the Appellants' convictions on the grounds that they deprived Louisiana of its right to honest services, § 1346 is relevant because it evidences Congress's intent to define the reach of the mail and wire fraud statutes broadly. *See Cleveland*, 951 F. Supp. at 1259 n.6.

Street Journal of its right to control the disclosure of confidential business information. *See* 484 U.S. at 28, 108 S. Ct. at 322.

Louisiana's interest in video poker licenses fits squarely within the above interpretation of "property rights." The Video Poker Law demonstrates that Louisiana zealously sought to protect its right to control the licenses. In particular, the Act mandates that a person seeking to obtain a license must apply to the Video Gaming Division for approval and must meet certain "suitability" criteria set forth in the Act. *See* La. R.S. 33:4862.10 (recodified at La. R.S. 27:310). We see no relevant difference between the Wall Street Journal's right to restrict the pre-publication release of confidential business information and Louisiana's right to choose the persons to whom it issues video poker licenses. As the Third Circuit noted in *Martinez*, 905 F.2d at 714, the Journal lost the intangible right to disseminate confidential information in the manner in which it pleased. Similarly, because of the Appellants' fraudulent scheme, Louisiana was stripped of its right to bestow the video poker licenses on those parties meeting its criteria.

B. *The Issued/Unissued Distinction*

Moreover, we are in full agreement with those courts that have found the distinction between issued and unissued licenses to be "esoteric." *See id.*; *Cleveland*, 951 F. Supp. at 1261. The courts that have embraced this distinction--and consequently have held that an unissued license is not property--provide no justification whatsoever for making the distinction. *See Granberry*, 908 F.2d at 280; *Kato*, 878 F.2d at 269; *Murphy*, 836 F.2d at 253-54. It is perhaps true, as some other courts have surmised, that the issued-unissued distinction is based upon the reasoning that an issued license has great value in the hands of the licensee

but an unissued license has negligible value in the hands of the government. *See, e.g., Martinez*, 905 F.2d at 713; *Cleveland*, 951 F. Supp. at 1261. But, as do *Martinez* and *Cleveland*, we also reject this questionable logic.

First, the law of the Fifth Circuit "strongly suggests that the strained distinction between issued and unissued licenses should be rejected." *Cleveland*, 951 F. Supp. at 1261. In *Loney*, 959 F.2d at 1334, the defendants were convicted of wire fraud based upon a scheme to defraud American Airlines of frequent-flyer award coupons. We held that the award coupons--as owned by an airline--are property for purposes of the wire fraud statute, notwithstanding the fact that airlines cannot use the award coupons themselves and that the award coupons arguably have little monetary value to the airlines. *See id.* at 1336; *see also Cleveland*, 951 F. Supp. at 1261. We have thus refused to draw a distinction between issued and unissued frequent-flyer award coupons, and we likewise see no relevant distinction between issued and unissued video poker licenses.

Second, it is simply not the case that unissued video poker licenses have only negligible value to Louisiana. In the hands of the licensee, the license is "something of value," for it allows the licensee to operate the video poker machines and collect significant revenue from their use; in the hands of Louisiana, the license has value both because (1) the State expects to collect an up-front fee (before issuance) and a percentage of net revenues (in the future) from the putative licensees and (2) the State values its rights to control the licenses and to choose the parties to whom it issues the licenses. The licensee and the licensor may value the video poker license differently; nevertheless, the license is valuable to both.

Third, as a number of courts have noted, the contention that "'licenses are property in the hands of the licensees, but never in the hands of the government represents an inversion of historical fact.'" *Cleveland*, 951 F. Supp. at 1261 (quoting *United States v. Turoff*, 701 F. Supp. 981, 989 (E.D.N.Y. 1988)); *see also Martinez*, 905 F.2d at 714. As noted by Professor Reich in his seminal article on property rights, a license is an example of government "largess" that "is originally public property, comes from the state, and may be withheld completely." Charles Reich, *The New Property*, 73 Yale L.J. 733, 778 (1964) (cited in *Martinez*, 905 F.2d at 714; *Cleveland*, 951 F. Supp. at 1261; *Turoff*, 701 F. Supp. at 989-90).

C. *The Regulatory Interest/Property Interest Distinction*

We are equally unimpressed with the argument that Louisiana has only a regulatory interest, and not a property interest, in the video poker licenses. Those courts articulating this distinction usually focus on the fact that the issuance of a license is nothing more than a physical manifestation of the government's intent to regulate. *See Schwartz*, 924 F.2d at 417 (arms export license); *Toulabi*, 875 F.2d at 125 (taxicab driver license). In *Schwartz*, for example, the defendants were convicted of wire fraud for fraudulently obtaining arms export licenses allowing them to sell certain munitions to foreign purchasers. *See Schwartz*, 924 F.2d at 416. In holding that such licenses do not constitute money or property under the mail fraud statute, the Second Circuit focused on the fact that it was merely fortuitous that the government chose to regulate arms sales by means of a license as opposed to a less formal symbol of government regulation. *See id.* at 417. That court stated:

> [T]he government's power to regulate does not *a fortiori* endow it with a property interest in the license; that is, the mere issuance of a document designed to formalize the government's regulation does not thereby create a property interest for the government.

Id.

The Second Circuit's logic, however, is not instructive in the instant case because of the difference between video poker licenses and arms export licenses. Unlike the arms export license analyzed in *Schwartz*, a video poker license does not merely signify government approval of an individual's right to take part in a particular regulated industry; it also evinces the State's intent to participate in that industry.

We agree, as an initial matter, that the right to regulate a particular industry does not *a fortiori* give the regulator a property interest in licenses signifying the government's regulation. Rather, a state's property interest in its licenses derives at least in part from the character of the licenses themselves. The issuance of the video poker licenses signifies not only that the licensee is eligible to participate in Louisiana's regulated video poker industry, but also defines the licensee's legitimate participation in an enterprise from which Louisiana derives significant revenues. "One of the main reasons for the recent legalization of video poker was that it was considered an ongoing source of revenue for the State." *Cleveland*, 951 F. Supp. at 1262. As such, the Video Poker Act requires the licensees to pay a significant, up-front fee for their licenses and also to deposit 22.5% of their net revenues into the state treasury as a franchise fee. La. R.S. 33:4862.11 (recodified at La. R.S. 27:311). Simply put, Louisiana has much more than a

regulatory interest in the video poker licenses; it has a direct and significant financial stake in its role as issuer of the licenses.[2/]

[2/] The facts and reasoning of *Toulabi*, 875 F.2d at 125, also illustrate why video poker licenses are different than other types of licenses. In that case, the Seventh Circuit held that taxicab driver licenses are not money or property under the mail fraud statute: "From the government's perspective, however, the license is a promise not to interfere rather than a sliver of property." *See id.* Indeed, in Chicago, a putative cab driver may obtain a license by paying a minimal fee of $50 and by passing a local geography test. It is not difficult to see why the *Toulabi* court reasoned that a cab driver license is a manifestation of the government's regulatory power: once an applicant shows that he is capable of navigating the streets of Chicago, the city will issue a license to him and promise not to interfere. In Louisiana, however, the State has a significant financial stake in the video poker industry, and once the licenses are issued, the State continues to "interfere" with the licensees in the sense that it receives 22.5% of each licensee's net revenues.

The Seventh Circuit itself distinguished *Toulabi* when it held that a defendant may be convicted under the mail fraud statute for fraudulently obtaining a cable television franchise. *See Borre v. United States*, 940 F.2d 215, 221 (7th Cir. 1991). That court stated, "a cable television franchise represents far more than a mere 'promise not to interfere' by the government." *Id.* (quoting *Toulabi*, 875 F.2d at 125). While we recognize that there are differences between fraudulently obtaining a video poker license and fraudulently obtaining a television franchise, we believe that video poker licenses (signifying the right to participate in the video poker industry) are much more analogous to the right to operate a television franchise than they are to the right to

D. *The Louisiana Statute*

Finally, the Appellants contend that the Video Poker Law itself illustrates that the State has no property interest in the video poker licenses:

> Any license applied for, granted, or issued under the provisions of this Chapter is a pure and absolute privilege, and the awarding, denial, or withdrawal of which is solely within the discretion of the division and, except as provided in this Chapter, without recourse at law. *Any license issued or renewed under the provisions of this Chapter is not property or a protected interest under the constitutions of either the United States or the state of Louisiana.*

La. R.S. 33:4862.1(D) (recodified at La. R.S. 27:301(D)) (emphasis added). We reject the Appellants' contention for a number of reasons.

First, this subsection does not speak to whether video poker licenses constitute a property interest of the State of Louisiana. Read as a whole, this subsection instead demonstrates that it was Louisiana's intent to circumscribe the property rights of the licensees, but not such rights of the State itself. Indeed, the first sentence of this subsection states that the "division," *i.e.*, the Video Gaming Division of the Louisiana State Police, has the discretion to award, deny, or withdraw the licenses. We conclude that the Louisiana legislature sought, by means of this section,to maintain its own control and ownership of the video poker licenses, and

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drive a taxicab.

we are in full agreement with the *Cleveland* court that section 4862.1(D) evinces the Louisiana legislature's intent to strengthen its own property interest in the licenses by limiting the property rights of the licensees. *See Cleveland*, 951 F. Supp. at 1263.

Second, even assuming, arguendo, that section 4862.1(D) limits the State's property right in the video poker licenses, we are not bound by that limitation for purposes of the federal mail fraud statute. Congress certainly could have defined property solely by reference to state law, but it chose not to do so in § 1341. Thus, we agree with the district court that when determining whether something is "property" for purposes of the federal mail fraud statute, it is appropriate to look not only to state statutes but also to "traditional property law." *See Carpenter*, 484 U.S. at 26, 108 S. Ct. at 320-21 (noting that confidential business information "has long been recognized" as property, and citing 3 W. Fletcher, Cyclopedia of Law of Private Corporations § 857.1 at 260 (rev. ed. 1986)); *Martinez*, 905 F.2d at 713 (referring to the "traditional property law" of Pennsylvania). Under traditional property law, licensees have a protected property interest. *See Martinez*, 905 F.2d at 713 (citing *Mackey v. Montrym*, 443 U.S. 1, 10, 99 S. Ct. 2612, 2616-17, 61 L. Ed. 2d 321 (1979); *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983)); *Cleveland*, 951 F. Supp. at 1263. The Louisiana legislature--despite section 4862.1(D)--itself recognized that video poker licensees have at least some property rights in the video poker licenses, for it legislated that a person whose license is suspended or revoked has the right to a hearing before the Video Gaming Division and the right to appeal the decision of the Division to a particular Louisiana court. *See* La. R.S. 33:4862.10(E) (recodified at La. R.S. 27:310(E)).

For the foregoing reasons, we hold that video poker licenses constitute money or property as required by the mail fraud statute.

III. ANONYMOUS JURY

The Appellants also challenge the district court's decision to empanel an anonymous jury. A district court's decision to use an anonymous jury is entitled to significant deference, and we review only for abuse of discretion. *See United States v. Sanchez*, 74 F.3d 562, 564 (5th Cir. 1996); *United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 963, 133 L. Ed. 2d 884 (1996).

This Court has previously noted that empanelment of an anonymous jury is a "drastic measure" that should be utilized only in limited circumstances. *See Krout*, 66 F.3d at 1427. Accordingly, we have held that such a practice is constitutional when necessary "to ensure against a serious threat to juror safety" so long as the defendants are not stripped of their rights to conduct an effective voir dire and to maintain the presumption of innocence. *See id.* The district court must base its decision to empanel an anonymous jury "on more than mere allegations or inferences of potential risk." *Id.* In keeping with this concern, however, we will affirm the use of an anonymous jury when "the evidence at trial supports the conclusion that anonymity was warranted." *Id.*

Factors that may justify impanelment of an anonymous jury include:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3)

> the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

Id. A district court may certainly consider evidence other than that relating to these five factors when deciding whether to empanel an anonymous jury, for the decision to do so should be based upon the "totality of the circumstances." *See United States v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996) *cert. denied*, ___ U.S. ___, 117 S. Ct. 1466, 1467, 137 L. Ed. 2d 681 (1997).

Finally, we have also affirmed a district court's decision to empanel an anonymous jury when there is no showing that the use of an anonymous jury either prejudiced the defendant's ability to select an impartial jury or undermined the defendant's presumption of innocence. *See id.* at 724-25.

Turning to the totality of the circumstances in this case, we are convinced that the district court did not abuse its discretion in empaneling the anonymous jury. Salvatore and the Tusas were closely connected with organized crime; indeed, many of their co-defendants with ties to organized crime had already pleaded guilty. Moreover, this Court previously upheld the empanelment use of an anonymous jury in an earlier trial of Felix Riggio, one of the Appellants' co-defendants, after determining that there had been specific death threats to witnesses in that case. *See United States v. Riggio*, ___ U.S. ___, 70 F.3d 336, 338 n.4, 339-40 (5th

Cir. 1995), *cert. denied*, 116 S. Ct. 1366, 134 L. Ed. 2d 531 (1996). Further, in one of the *in camera* hearings before the district court, the Government showed that the Manhattan District Attorneys' office was investigating whether co-defendant Joseph Corozzo had tampered with a juror in connection with his acquittal of criminal charges in New York. Although we note that Riggio and Corozzo pleaded guilty before trial, their involvement in the video poker conspiracy establishes that Appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process. *Cf. Krout*, 66 F.3d at 1427 n.7 (noting that specific evidence linking defendants to organized crime "alone can . . . translate into the requisite showing for the empanelment of an anonymous jury").

Even though the Appellants ultimately did not receive lengthy terms of imprisonment, they--especially Salvatore--initially faced potentially long sentences. Additionally, despite the fact that many of the co-conspirators had pleaded guilty, the publicity surrounding the trial was quite extensive, thus enhancing the possibility that the jurors' names would have become public.

Furthermore, none of the Appellants have pointed to any prejudice or adverse impact on their ability to conduct effective voir dire. The district court's procedures in empaneling the jury had only a minimal impact upon the case, as the court merely substituted numbers for the jurors' names. The court also allowed the Appellants extensive voir dire and furnished the Appellants with the results of detailed juror questionnaires. Neither the information gleaned from these questionnaires nor the voir dire was deficient in any way, and therefore the district court adequately protected the Appellants' right to an effective voir dire. *See Branch*, 91 F.3d at 724 (noting that defendants were not deprived of an

effective voir dire when they were provided with the answers to detailed juror questionnaires).

Moreover, the district court's use of an anonymous jury did not frustrate the Appellants' presumption of innocence. The court's instruction to the jury was a "plausible and nonprejudicial reason for not disclosing their identities" to either the Government or the defendants. *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991). The court explained that the case was a high profile one and that keeping the jurors' names confidential would protect them from unwanted phone calls:

> Now with any potentially high profile case, we're all subject to quack phone calls and anonymous letters and that sort of thing. I want to protect the defendants as well as the government from any belief on any part of the jury that any such communications are coming from one side or the other. In other words, I don't want the defendants to be characterized as anyone who would be sending anonymous communications to the jury; I don't want the government to be characterized as someone who is trying to influence the jury improperly.
>
> The use of an anonymous jury is to ensure that both sides will get a fair trial. It's not being done because of any apprehension on the part of this court that you would be in danger or subject to improper pressures if your name had been disclosed.

Such an explanation is indeed plausible and nonprejudicial. The court's instruction comports fully with the Appellants'

presumption of innocence and compares favorably with instructions approved in other anonymous jury cases. *See Branch*, 91 F.3d at 725; *Riggio*, 70 F.3d at 340 & n.23; *United States v. Edmond*, 52 F.3d 1080, 1093 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 539, 133 L. Ed. 2d 443 (1995); *United States v. Tutino*, 883 F.2d 1125, 1133 (2d Cir. 1989).

IV. SEVERANCE

The Tusas present two reasons why the district court erred in denying their motion for severance. First, they contend that they were forced to endure trial by an anonymous jury, which was necessary only because of Sebastian Salvatore. Second, they claim that nearly the entire trial consisted of evidence irrelevant and highly prejudicial to them, viz., evidence of mafia ties not implicating them.

We review for abuse of discretion. *United States v. Rocha*, 916 F.2d 219, 227 (5th Cir. 1990). "To demonstrate an abuse of discretion, a defendant must show that he suffered specific and compelling prejudice against which the district court could not provide adequate protection, and that this prejudice resulted in an unfair trial." *Id.* A district court should grant a severance motion "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *United States v. Walters*, 87 F.3d 663 (5th Cir.) (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 117 S. Ct. 498, 136 L. Ed. 2d 390 (1996).

The Tusas' first argument is meritless because, as discussed above, empaneling the anonymous jury did not violate any of their constitutional rights. The Tusas were part of the same criminal conspiracy as was Salvatore; the

totality of the circumstances justify the court's decision to withhold the jurors' names and addresses from the parties; and the court's jury instructions ensured that the Tusas suffered no prejudice. The Tusas' second contention is likewise without merit because evidence of the criminal enterprise was relevant to their guilt, for they were charged with concealing criminal ties to their outwardly legitimate business.

V. CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

The Tusas also contend that their convictions must be reversed because the trial court allowed the Government to constructively amend its indictment. Alternatively, they maintain that the Government's proof constituted a prejudicial variance.

Only the grand jury can amend the indictment to broaden it. *See United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993). A constructive amendment of the indictment occurs when the Government changes "its theory during trial so as to urge the jury to convict on a basis broader than that charged in the indictment." *Id.* A constructive amendment of the indictment can also occur if the Government is allowed to prove "an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment." *United States v. Slovacek*, 867 F.2d 842, 847 (5th Cir. 1989). Reversal is required when a conviction is based upon an indictment that has been constructively amended. *See id.*

A variance occurs where the evidence proves facts different from those alleged in the indictment, but does not modify an essential element of the charged offense. *See United States v. Puig-Infante*, 19 F.3d 929, 935 (5th Cir.

1994). We review a variance under the harmless error standard, *see Slovacek*, 867 F.2d at 848, and we will reverse a conviction only upon a showing that the variance prejudiced the defendant's substantial rights. *See Puig-Infante*, 19 F.3d at 936. In determining whether a defendant has suffered prejudice, "our concern is that 'the indictment notifies a defendant adequately to permit him to prepare his defense, and does not leave the defendant vulnerable to a later prosecution because of failure to define the offense with particularity.'" *Id.* (quoting *United States v. Hernandez*, 962 F.2d 1152, 1159 (5th Cir. 1992)).

Counts 12-14 of the indictment charged that the Tusas and others devised a scheme to defraud the State of Louisiana by

> fraudulently obtaining state video poker route operator licenses for Bayou Casino, Inc. through intentionally concealing the involvement of organized crime . . . in Bayou Casino, Inc. as true owners, operators, and controllers of this video draw poker license-applicant route operator company.
>
> In was a part of the scheme and artifice to defraud, that the defendants would use co-defendants A.J. Tusa and Vic Tusa as apparently legitimate"front men" or "straw men" in attempting to secure the electronic video gaming device licenses and mask the New Orleans organized crime family's hidden ownership interest in Bayou Casino, Inc. gaming operations.

The Tusas argue that during trial "the government abandoned the argument that the Tusas hid organized crime ownership

of Bayou Casinos." Instead, the Tusas contend, the Government (1) presented evidence that the Tusas failed to disclose a contractual relationship with Louisiana Route Operators, and (2) argued that the Tusas' failure to disclose the LRO contract was a violation of their "continuing duty" under the Video Poker Act to inform the Video Gaming Division of their business contacts.

We think that the evidence presented by the Government did not constructively amend the indictment or constitute a prejudicial variance because evidence of the Tusas' failure to disclose their contract with the mob-controlled LRO is an example of the concealment of mob interests charged in the indictment. The Tusas disagree, asserting that "the government did not argue that the existence of the LRO contract was evidence of the mob's secret ownership of Bayou Casinos. Rather, as stated by the government prosecutors, it was the failure to disclose the contract itself that became the subject of the mail fraud under the government's amended charge."

The Tusas' argument has little merit. The indictment charges that the Tusas concealed the involvement of organized crime in Bayou Casino. The record shows the same: Joseph Marcello, Jr. instructed Christopher Tanfield to give the Tusas preferential treatment; Marcello mediated disputes that arose between the Tusas and other video poker ventures; Anthony Carollo instructed Victor Tusa not to sign a particular business agreement; and the Marcello crime family contracted to receive 25% of Bayou Casino's profits through an arrangement with LRO. Although LRO's 25% interest in Bayou Casino is perhaps the most explicit documentary evidence of organized crime's significant control over Bayou Casino, it is by no means the only evidence of such control. The Government's contention that the Tusas violated their "continuing duty" under state law is

simply another way of proving that the Tusas concealed the mob's control of Bayou Casino.

VI. CO-CONSPIRATOR STATEMENTS

Finally, the Tusas contend that the district court erred by admitting co-conspirator statements into evidence pursuant to Fed. R. Evid. 801(d)(2)(E). They also assert that, under *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979), the court should have required the Government to show, prior to admitting the declarations of the co-conspirators into evidence, that the Tusas were part of a conspiracy. We review for abuse of discretion. *See United States v. Triplett*, 922 F.2d 1174, 1180 (5th Cir. 1991).

A statement is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). By a preponderance of the evidence, the offering party must prove that there is a conspiracy involving the declarant and the nonoffering party and that the statement was made during the course and in furtherance of the conspiracy. *See Triplett*, 922 F.2d at 1181. To connect a defendant to a conspiracy, the Government must show that the defendant knew of the conspiracy and voluntarily joined it. *See Ismoila*, 100 F.3d at 387.

As we resolved above, the evidence establishes that there was a conspiracy, that the Tusas voluntarily joined it, and that the statements were made during the course and in furtherance of the conspiracy. When reasonably practicable a district court should require a showing of a conspiracy and the defendants connection with it before admitting the statements of a co-conspirator. *United States v. Fragoso*, 978 F.2d 896, 900 (5th Cir.1992); *James*, 590 F.2d at 582. Contrary to the Tusas' contention, however, the district court

did in fact require the Government to submit evidence linking the Tusas to the charged conspiracy before it ruled, prior to trial, that the Government had "produced at least enough evidence to keep the issue open through trial." Although the court left open the possibility that it would reconsider its decision after hearing all the evidence, the court confirmed its determination at the close of the Government's case.

The record therefore supports not only the finding that the Tusas were linked to the conspiracy and that the statements were made during the course of and in furtherance of the conspiracy, but it also reflects that the court made a preliminary determination prior to trial that the co-conspirator statements were admissible. We therefore conclude that the district court did not abuse its discretion in admitting the co-conspirator statements into evidence pursuant to Fed. R. Evid. 801(d)(2)(E).

CONCLUSION

For the foregoing reasons, we affirm the Appellants' convictions on all counts.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30221

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

SEBASTIAN SALVATORE, also known as Buster, also known as Harry, ANTHONY JOSEPH TUSA, JR., also known as AJ, VICTOR JOSEPH TUSA, SR., also known as Vic,

Defendants - Appellants

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON SUGGESTION FOR REHEARING EN BANC

(Opinion April 14, 1997 5 Cir.____ , F.3d ____)

Before DUHE', BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[Signature]
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	* CRIMINAL ACTION
VERSUS	* NO. 94-158
ANTHONY S. CAROLLO, ET AL.	* SECTION "N"

ORDER AND REASONS

The defendants have jointly moved this Court to dismiss Counts 3-7, 9-10, and 12-14, and Racketeering Acts 1(B), 2(B), 2(C), 3(B), and 3(C), all of which allege violations of 18 U.S.C. § 1341, the federal mail fraud statute. In support of their motion, the defendants argue that video draw poker licenses do not constitute the "money or property" required to support a conviction under that statute. The government has submitted several arguments in opposition to the defendants' motion. After a careful consideration of the difficult issues involved, the court has determined that the defendants' motion should be denied.

The federal mail fraud statute provides in relevant part that

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of

> false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341. Counts 3-7 of the indictment in this case charge a subset of the defendants with

> knowingly and willfully devis[ing] and intend[ing] to devise a scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses, representations and promises, that is, to defraud the State of Louisiana, through the Louisiana Department of Public Safety and Corrections, Office of State Police, Video Gaming Division and the citizens of the State of Louisiana, by fraudulently obtaining state video draw poker route operator and distributor licenses for Worldwide Gaming and Louisiana Route Operators.

Counts 9-10 charge a different subset of the defendants with the same thing in connection with obtaining licenses for Tangi Amusement Co. and Florida Parish Distributors, Inc. Counts 12-14 charge a third subset of the defendants with the same thing in connection with obtaining licenses for Bayou Casino, Inc. The defendants argue that these counts of the indictment must be dismissed because video draw poker route operator and distributor licenses are not "property" as contemplated by 18 U.S.C. § 1341.

As the defendants correctly point out, several circuits have held that state-issued licenses of various sorts are not property for purposes of the mail fraud statute. See United States v. Schwartz, 924 F.2d 10, 417-18 (2nd Cir. 1991) (export license); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator permit); United States v. Kato, 878 F.2d 267, 268-69 (9th Cir. 1989) (pilot license); Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989) (cab driver license); United States v. Murphy, 836 F.2d 248, 254 (6th Cir.), cert. denied, 488 U.S. 924 (1988) (bingo license); United States v. Dadanian, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license). The Third Circuit and the First Circuit, on the other hand, have held to the contrary. In United States v. Martinez, 905 F.2d 709 (3rd Cir. 1990), the Third Circuit Court of Appeals considered the defendant's challenge to a mail fraud conviction based on the fraudulent obtaining of a medical license from the Commonwealth of Pennsylvania. Martinez, like the defendants here, argued that the medical license was not "property" and could not support a mail fraud conviction. The Court of Appeals rejected this argument, and the reasoning found in Murphy, Kato, and Dadanian, noting that it

> depends on the questionable statutory construction that someone who fraudulently acquires property that has great value once acquired, has not violated the mail fraud statute if the item acquired had no, or negligible, value in the hands of the victim. Nothing in the statutory language supports that theory. The statute, which proscribes "obtaining money or property," is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer as well as a scheme to

> defraud a victim of property valuable to the victim but valueless to the acquirer.

Martinez, 905 F.2d at 713-14. In United States v. Bucuvalas, 970 F.2d 937 (1st Cir. 1992), the First Circuit Court of Appeals considered the defendant's challenge to a mail fraud conviction predicated on the fraudulent obtaining of liquor and entertainment licenses from the City of Boston. The court held that the unissued licenses were the city's property for purposes of the mail fraud statute because the city had the right to control their issuance. The court further held that even if the licenses did not become property until they were issued, the city retained a right to control their alienation by the licensees, which was a property right the deprivation of which could support a mail fraud conviction.

The defendants distinguish Martinez and Bucuvalas on the grounds that the Louisiana legislature has provided that a video draw poker license is "not property or a protected interest under the constitutions of either the United States or the state of Louisiana." La. Rev. Stat. § 33:4862.1(D). They argue that this designation under Louisiana law leads to the inevitable conclusion that the licenses should not be considered property for purposes of the mail fraud statute. The Court does not agree. When determining whether something is "property" for purposes of the federal mail fraud statute, it is appropriate to look not only to state statutes, but also to "traditionally property law." Martinez, 905 F.2d at 713. Under traditional property law, it is a "well-accepted proposition" that licensees have a protected property interest. Id., citing Mackey v. Montrym, 443 U.S. 1, 10, 99 S. Ct. 2612, 2617 (1979); Beauchamp v. De Abadia, 779 F.2d 773, 775 (1st Cir. 1985); Keney v. Derbyshire, 718 F.2d 352, 354 (10th Cir. 1983); Kudish v. Bradley, 698 F.2d 59, 61 (1st Cir. 1983). The fact that the Louisiana legislature has chosen to deprive video draw poker

licensees of this interest for certain purposes does not mean that federal courts should accept that deprivation for all purposes, including determinations of the scope of federal criminal statutes. If Congress had intended the scope of the federal mail fraud statute to depend on state law definitions of property, it could have so provided. The Court is unable to discern any such intent from the language of 18 U.S.C. § 1341.

Finally, the Court notes that the United States Supreme Court has construed the term "property" in the federal fraud statutes to signify "something of value." McNally v. United States, 483 U.S. 350, 358, 107 S. Ct. 2875, 2881 (1987); Carpenter v. United States, 484 U.S. 19, 108 S. Ct. 316 (1987). The Fifth Circuit Court of Appeals has further observed that "we construe 'property' in a broad sense for purposes of the federal fraud statutes." United States v. Loney, 959 F.2d 1332, 1335-36 (5th Cir. 1992). Clearly a video draw poker route operator or distributor license is "something of value" when in the hands of the licensee. As the Supreme Court has noted, "once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood." Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589 (1971).

Because the court finds that a federal mail fraud conviction may be sustained by the fraudulent obtaining of a video draw poker distributor or operator license, defendants' Motion to Dismiss Counts 3-7, 9-10, and 12-14, and Racketeering Acts 1(B), 2(B), 2(C), 3(B), and 3(C), is hereby DENIED.

New Orleans, Louisiana, this 21 day of August, 1995.

[Signature]
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

(2)

Nos. 97-236 and 97-5469

In the Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY J. TUSA, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SEBASTIAN SALVATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the court of appeals properly reviewed under the abuse of discretion standard the trial court's determination to empanel an anonymous jury.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Carpenter v. *United States*, 484 U.S. 19 (1987)	7, 9, 10
McNally v. *United States*, 483 U.S. 350 (1987)	7, 10, 12
Toulabi v. *United States*, 875 F.2d 122 (7th Cir. 1989)	11, 12
United States v. *Childress*, 58 F.3d 693 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996)	13
United States v. *Dadanian*, 856 F.2d 1391 (9th Cir. 1988)	11, 12
United States v. *Darden*, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 116 S. Ct. 1449 (1996)	13
United States v. *DiDomenico*, 78 F.3d 294 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996)	13
United States v. *Edmond*, 52 F.3d 1080 (D.C. Cir.), cert. denied, 516 U.S. 998 (1995)	13
United States v. *Granberry*, 908 F.2d 278 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991)	11, 12
United States v. *Kato*, 878 F.2d 267 (9th Cir. 1989)	11, 12
United States v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990)	9-10
United States v. *Murphy*, 836 F.2d 248 (6th Cir.), cert. denied, 488 U.S. 924 (1988)	11, 12
United States v. *Novod*, 923 F.2d 970 (2d Cir.), cert. denied, 500 U.S. 919 (1991)	12

Cases—Continued: Page

United States v. *Paccione*, 949 F.2d 1183 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992) 12, 13
United States v. *Ross*, 33 F.3d 1507 (11th Cir. 1994), cert. denied, 515 U.S. 1132 (1995) 13
United States v. *Schwartz*, 924 F.2d 410 (2d Cir. 1991) 11, 12
United States v. *Thai*, 29 F.3d 785 (2d Cir.), cert. denied, 513 U.S. 977 (1994) 14
United States v. *Thornton*, 1 F.3d 149 (3d Cir.), cert. denied, 510 U.S. 982 (1993) 13
United States v. *Vario*, 943 F.2d 236 (2d Cir. 1991), cert. denied, 502 U.S. 1036 (1992) 14
United States v. *Wong*, 40 F.3d 1347 (2d Cir. 1994), cert. denied, 516 U.S. 870 (1995) 14

Statutes:

18 U.S.C. 1341 ..... 2, 7, 9
18 U.S.C. 1343 2
18 U.S.C. 1346 12
18 U.S.C. 1952 2
18 U.S.C. 1955 2
18 U.S.C. 1962 2
Video Draw Poker Devices Control Law, La. Rev. Stat. Ann. (West Supp. 1997):
§§ 27:301-27:324 3
§ 27:301(D) 8

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-236

ANTHONY J. TUSA, JR., ET AL., PETITIONERS

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SEBASTIAN SALVATORE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is reported at 110 F.3d 1131.

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[1] "Pet. App." refers to the appendix to the petition in No. 97-236.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1997. A petition for rehearing was denied on May 27, 1997 (Pet. App. 33a-34a). The petition for a writ of certiorari in No. 97-236 was filed on August 7, 1997, and the petition for a writ of certiorari in No. 97-5469 was filed on August 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Anthony and Victor Tusa were convicted on two counts of mail fraud, and petitioner Salvatore was convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341.[2] In addition, petitioner Salvatore was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962); one count of conspiring to commit that offense (18 U.S.C. 1962); two counts of conducting an illegal gambling business (18 U.S.C. 1955); 16 counts of wire fraud (18 U.S.C. 1343); and one count of interstate travel in aid of racketeering activity (18 U.S.C. 1952). The Tusas each were sentenced to ten months' imprisonment, an $11,838 fine, and $37,048 in restitution. Salvatore was sentenced to 18 months' imprisonment and $25,000 in restitution. The court of appeals affirmed. Pet. App. 1a-31a.

1. The evidence at trial showed that petitioners were part of a scheme through which several Mafia

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[2] The Tusas were acquitted of conducting an illegal gambling business (18 U.S.C. 1955). Before trial, 15 co-defendants pleaded guilty to various charges.

crime families intended to control the video poker gambling industry in Louisiana.

In 1991, Louisiana enacted the Video Draw Poker Devices Control Law, see La. Rev. Stat. Ann. §§ 27:301-27:324 (West Supp. 1997), which legalized video poker machines. To operate in the State, video poker machine manufacturers, distributors, and owners had to be licensed. The licensing criteria provided that a license applicant had to be a person of good character who had not been convicted of certain criminal offenses. Pet. App. 2a. The Video Gaming Division of the Louisiana State Police was charged with oversight of the video poker industry. *Ibid.*

Co-defendants Christopher Tanfield and Steven Bolson operated Worldwide Gaming of Louisiana, Inc. (Worldwide Gaming), and Louisiana Route Operators, Inc. (LRO). Worldwide Gaming had licenses to sell and distribute video poker machines. LRO was licensed as a route operator company, which gave it the power to own video poker machines, place them in businesses, and receive revenue from the operation of the machines. Pet. App. 3a-4a. Tanfield and Bolson obtained licenses for those companies by concealing the fact that the companies and they, in reality, were "fronts" for organized crime, including the New Orleans-based Marcello crime family and the New York-based Gambino crime family. Petitioner Salvatore was a member of the Marcello organized crime family. *Id.* at 4a.

Tanfield and Bolson operated under the direction of organized crime as wholesalers in the video poker industry. They bought video poker machines from Bally Gaming, sold the machines to various businesses in Louisiana, and participated in the routes of those businesses. Tanfield and Bolson then funneled

the money that Worldwide Gaming and LRO received to the Marcello and Gambino organized crime families. Petitioners Victor and Anthony Tusa owned and operated Bayou Casino, Inc., a video poker route operator. Pet. App. 4a.

In their application for a license for Bayou Casino, the Tusas did not state that the company had any relationship with any co-defendant, including petitioner Salvatore, or with any other organized crime figures. Gov't C.A. Br. 9-10. The Tusas' license application instead stated that they alone were the persons who had substantial direct or indirect controlling interest in the company. *Id.* at 10. The State Police relied on those statements in issuing a license to the Tusas. *Ibid.* In fact, however, the Tusas' company was controlled by Marcello organized crime family members.

On July 9, 1992, Anthony Tusa spoke to Marcello family member Joseph Gagliano. Tusa expressed concern about dealing with Bolson and Tanfield; he said he would prefer to deal with Marcello family head Anthony Carollo or with family members Gagliano, Frank Gagliano, Sr., Joe Marcello, and Salvatore. Gov't C.A. Br. 14.[3] On July 13, 1992, Anthony Tusa told Gagliano that he thought he would have a "sit down" meeting with the mob members to discuss his and his brother's business with the mob. *Ibid.* In September 1992, Carollo, the Gaglianos, and Marcello discussed their involvement in the video poker business, including their relationship with Anthony Tusa. *Id.* at 15-16. On December 2, 1992, Carollo, Marcello, Salvatore, and others met to discuss

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[3] Recordings of those intercepted conversations were played for the jury. Gov't C.A. Br. 14.

putting the various companies under the umbrella of co-defendant Felix Riggio's companies. *Id.* at 17.

On December 17, 1992, Victor Tusa met with Carollo, the Gaglianos, and Riggio. Tusa discussed a potential service contract from Bolson; the others told Tusa not to sign that contract. According to an expert witness, that conversation showed that Tusa wanted to get approval first from the true owners of the company, the Marcello crime family. Gov't C.A. Br. 17-18.

The Tusas met again with the mob members on January 7, 1993. At that meeting, the Tusas were told that they were to provide the Marcello crime family with 25% of Bayou Casino's profits. Victor Tusa said he had no problem dealing with the Marcello family members; he simply expressed his desire that the dealings be "fair." Gov't C.A. Br. 19.

2. Before trial, the government moved for an anonymous jury; most of the defendants opposed that motion. The government also provided the district court, ex parte, with evidence showing the need for an anonymous jury.[4] The prosecutors initially based their request on the likelihood that co-defendant Joseph Corozzo had "fixed" a jury in a then-recent New York state prosecution and on co-defendant Riggio's death threats to witnesses in a previous

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[4] When the case reached the court of appeals, the government moved to unseal the information it had provided to the district court, and the court of appeals approved that unsealing. As a result, petitioners had full access to the basis on which the district court had made its ruling.

federal trial. C.A. R.E. Addendum 1; see Pet. App. 23a-24a.[5]

Almost two months later, after most of petitioners' co-defendants had pleaded guilty, the trial court asked in camera if the government still requested an anonymous jury. The prosecutors responded that they still sought such relief, because Salvatore was a high-ranking member of the Marcello crime family, and co-defendant Kenneth Jowaiszas was "the accountant to the mob" in New Orleans and New York. C.A. R.E. Addendum 2, at 2, 4-5. Because of those associations, the prosecutors contended, other members of the Mafia would seek to influence the jury so that Salvatore and Jowaiszas would not be convicted and not feel compelled to cooperate with the government in order to avoid lengthy sentences. *Id.* at 8-9. While one of the prosecutors conceded that the need for an anonymous jury might be less compelling if Jowaiszas pleaded guilty, another prosecutor pointed out that the presence of any Mafia-related defendant presented issues of juror safety. *Id.* at 12-13, 19-20. The court decided to proceed with an anonymous jury. *Id.* at 20.

During voir dire examination, the court informed the prospective jurors that their names, addresses, and places of employment for themselves and their spouses would not be revealed to the government or the defendants. C.A. R.E. Addendum 3, at 6. The court told the venire that the purpose of an anonymous jury was to ensure that both sides received a

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[5] "C.A. R.E. Addendum" refers to the record excerpts that the government filed under seal in the court of appeals, and that that court later ordered to be unsealed.

fair trial and was not a reflection on the defendants or anyone associated with them. *Id.* at 7-8.

3. The court of appeals rejected petitioners' various challenges to their convictions. With respect to petitioners' challenge to the anonymous jury, the court of appeals concluded that use of such a jury was justified because of petitioners' close connection to organized crime, including persons who had "the capacity and willingness to interfere with the judicial process" by tampering with juries. Pet. App. 24a. The court also noted that petitioners faced potentially long sentences, and that there was much publicity surrounding the case, "thus enhancing the possibility that the jurors' names would have become public." *Ibid.* The court also pointed out that petitioners' ability to conduct an effective voir dire of the jury was not impaired, and that the trial judge had given a "plausible and nonprejudicial" explanation to the jurors for why their names would not be made public, so that petitioners' presumption of innocence was not impaired. *Id.* at 25a-26a.

The court below likewise rejected the Tusas' challenge to their mail fraud convictions. In a lengthy discussion, the court of appeals held that the video poker licenses constituted "money or property" within the meaning of the mail fraud statute, 18 U.S.C. 1341. Pet. App. 10a-22a. Relying on *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), the court reasoned that, "in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder." Pet. App. 12a. The court held that Louisiana had more than just a regulatory interest in the video poker licenses, there-

by justifying application of the mail fraud statute. *Id.* at 13a.

The court below first reasoned that the concept of property involves a legal "bundle of rights," including the rights to "possess, use, and dispose" of a particular article. Pet. App. 14a. As applied here, the court found that that "bundle" includes the right to control issuance of a license. The court also concluded that Louisiana had "zealously sought to protect its right to control [video poker] licenses." *Id.* at 15a. The court went on to reject a distinction between issued and unissued licenses, and it found that unissued video poker licenses had value to the State. *Id.* at 16a-17a. The court of appeals further determined that the State had a property, and not merely a regulatory, interest in the video poker licenses, because the State had "a direct and significant [continuing] financial stake * * * as issuer of the licenses" in the video poker industry. *Id.* at 19a.

Finally, the court of appeals concluded that the Louisiana statutory scheme evinces the legislature's intent for the State to maintain its control and ownership of video poker licenses by expressly stating a limitation on the property interests of licensees. Pet. App. 20a-21a (discussing La. Rev. Stat. Ann. § 27:301(D) (West Supp. 1997)). Similarly, after applying traditional property law concepts, the court below found that the licenses constituted property. *Id.* at 21a-22a.[6]

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[6] The court of appeals also rejected petitioners' other challenges to their convictions, including that there was insufficient evidence to sustain their convictions, that the Tusas should have received a separate trial, that the indictment was constructively amended, and that co-conspirator statements

ARGUMENT

1. Petitioners contend (97-236 Pet. 11-19) that the video poker licenses at issue in this case do not constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341 Contrary to petitioners' claim, the court of appeals correctly rejected that contention and it does not warrant further review.

a. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court affirmed the wire fraud conviction of a *Wall Street Journal* columnist who had traded stock before publication of his newspaper column based on his knowledge of what that column would say. The Court made clear that the intangible nature of the misappropriated confidential information did not make the information any less a form of "property" within the meaning of the mail fraud statute. *Id.* at 25-27. The Court explained that the *Journal* had been deprived of its property right to the exclusive use of its confidential information, even though the defendants had not totally deprived the *Journal* of its possession of the information or its ability to publish it. *Id.* at 26-27.

Here, the court of appeals correctly concluded that the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information. In *Carpenter*, the Court held that the *Journal*'s exclusive right to control its confidential information was a property interest. 484 U.S. at 26. By the same token, in this case, "what the [State] (and derivatively its

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were wrongly admitted at trial. Pet. App. 5a-10a, 26a-31a. Petitioners do not renew those claims here.

people) lost was the right to keep its [video poker] licenses to itself and to bestow them on persons who had fairly earned them." *United States* v. *Martinez*, 905 F.2d 709, 714 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). The State also lost the right to substantial, continuing earnings under the license. The court of appeals thus correctly found that the licenses had continuing value to the State.[7]

b. Petitioners contend (Pet. 11-15) that the decision in this case conflicts with holdings of other courts of appeals that particular licenses, especially unissued licenses, did not constitute property under the mail fraud statute. Although the court criticized reasoning in some of those cases that an unissued license cannot be "property" even though an issued license can be, see Pet. App. 15a-17a, it ultimately explained that "video licenses are different from other types of licenses," *id.* at 19a n.2, because of the "character of the licenses themselves," *id.* at 18a. Because of those distinct characteristics of

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[7] There is no merit to petitioners' suggestion (Pet. 18) that the decision in this case is inconsistent with *McNally* v. *United States*, 483 U.S. 350 (1987). In that case, this Court held that there was no "property" taken within the meaning of 18 U.S.C. 1341 by a scheme to defraud citizens of their "intangible right" to honest government. The Court ruled that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." 483 U.S. at 356. Because the indictment in *McNally* made no allegation that the fraud being charged related to "property," there was no occasion for the Court to address whether a license like the kind at issue in this case is "property" within the meaning of Section 1341. And as the Court made clear in *Carpenter*, "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." 484 U.S. at 25.

Louisiana's video poker license, the holding here is distinguishable from court of appeals decisions that have reversed mail fraud convictions on the ground that various types of licenses were not "property." See, *e.g.*, *United States* v. *Schwartz*, 924 F.2d 410, 417-418 (2d Cir. 1991) (arms export license); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator's permit), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (private pilot's license); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license); *United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.) (bingo license), cert. denied, 488 U.S. 924 (1988).

As the court of appeals explained, those cases rest on the theory that, in the manner in which particular licenses operated in the states that had issued them, those licenses did not represent property to the issuing governments. Rather, under the reasoning of those cases, "the issuance of a license is nothing more than a physical manifestation of the government's intent to regulate." Pet. App. 17a. The court of appeals in this case "agree[d], as an initial matter, that the right to regulate a particular industry does not *a fortiori* give the regulator a property interest in licenses signifying the government's regulation." *Id.* at 18a. Here, however, the State "has a direct and significant financial stake in its role as issuer of the licenses" because it received an "up-front fee" for the license and a significant percentage of net revenues as a franchise fee. *Id.* at 19a. The court noted that the State fully expected to receive continuing funds from the video poker license (22.5% of the licensee's net revenues), such that the license "evinces the

State's intent to participate in that industry." *Id.* at 18a. That entitlement to future revenue gave the State a continuing property interest in the license and therefore justifies a conclusion that the licenses, in the words of *McNally*, represent "[g]overnment's interests as property holder" (483 U.S. at 359 n.8).

The cases on which petitioners rely involve licenses that lack that revenue-producing feature. See *Murphy*, 836 F.2d at 250-254 (no indication of continuing financial stake by government in the bingo license); *Granberry*, 908 F.2d at 280 (same for bus license); *Dadanian*, 856 F.2d at 1392 (same for poker club license); *Kato*, 878 F.2d at 269 (same for pilot's license); *Schwartz*, 924 F.2d at 417-418 (same for arms export license); *United States* v. *Novod*, 923 F.2d 970, 975 (2d Cir.) (same for waste dumping permit), cert. denied, 500 U.S. 919 (1991); *United States* v. *Paccione*, 949 F.2d 1183, 1186-1187 (2d Cir. 1991) (same for medical waste dumping permit), cert. denied, 505 U.S. 1220 (1992); *Toulabi*, 875 F.2d at 126 (same for taxi driver license). Accordingly, none of those cases conflicts with the holding that the video poker licenses represented a property right protected under the mail fraud statute.[8]

2. Petitioners also argue (97-5469 Pet. 9-16; 97-236 Pet. 19) that it was improper to empanel an anony-

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[8] To the extent that the cited decisions rest on a view that the mail fraud prosecutions were deficient because they rested on the intangible rights theory rejected by *McNally*, those decisions have no continuing importance in light of 18 U.S.C. 1346's provision, enacted after *McNally*, that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." All of the decisions on which petitioners rely arose from schemes that were executed before Section 1346 was enacted.

mous jury for their trial, and that the court of appeals employed the wrong standard of review—abuse of discretion—in upholding the trial court's determination. That claim is without merit.

The courts have recognized that a decision to withhold the names and addresses of members of the jury venire "require[s] a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings." *United States* v. *Childress*, 58 F.3d 693, 702 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996). Accordingly, "[w]ith so many factors entering the calculus, each varying subtly, an appellate court's de novo resolution of the issue would merely duplicate the trial judge's efforts." *Ibid.* Hence, the proper scope of review is for abuse of discretion. *Id.* at 702-703. Accord *United States* v. *DiDomenico*, 78 F.3d 294, 301-302 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); *United States* v. *Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995), cert. denied, 116 S. Ct. 1449 (1996); *United States* v. *Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994), cert. denied, 515 U.S. 1132 (1995); *United States* v. *Thornton*, 1 F.3d 149, 154 (3d Cir.), cert. denied, 510 U.S. 982 (1993).[9]

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[9] In *Darden*, the court further noted the prudence of following certain "guidelines," which generally provide that "a court should not empanel an anonymous jury without 'a) concluding that there is strong reason to believe the jury needs protection, and b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected.'" 70 F.3d at 1532 (quoting *Paccione*, 949 F.2d at 1191-1193. The *Darden* court noted that, in adopting those "guidelines," it was following the Second Circuit (which had suggested them in *Paccione*) and the D.C. and Eleventh Circuits. *Ibid.* (citing *United States* v. *Edmond*,

Petitioners rely primarily upon *United States* v. *Vario*, 943 F.2d 236 (2d Cir. 1991), cert. denied, 502 U.S. 1036 (1992), for their claim that the court of appeals should have employed a more exacting standard of review of the trial court's determination. In that case, however, the court of appeals affirmed a trial court's decision to empanel an anonymous jury under what appears to have been an abuse of discretion standard. The court of appeals pointed out that the trial court was justified in relying on the fact that Vario's co-conspirator was charged with grand jury tampering and that it was expected that there would be publicity surrounding the case. *Id.* at 240.

More recently, the Second Circuit has made clear that so long as there is evidence to support the district court's finding that there is reason to believe the jury needs protection, and the district court takes reasonable precautions to minimize the prejudicial effects on a defendant, "the trial court is accorded broad discretion to determine whether to empanel an anonymous jury." *United States* v. *Wong*, 40 F.3d 1347, 1376 (1994), cert. denied, 516 U.S. 870 (1995); *United States* v. *Thai*, 29 F.3d 785, 801, cert. denied, 513 U.S. 977 (1994). The district court determined here that there was reason to believe that the anonymity of the jury required protection, partly because of anticipated publicity and partly because of Salvatore's connection to organized crime. Pet. App. 23a-24a. The trial court also took steps to ensure that petitioners' rights would be protected; it told the jury that it was not revealing their names and addresses to protect the fair trial rights of both the government

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52 F.3d 1080, 1090-1091 (D.C. Cir.), cert. denied, 516 U.S. 998 (1995); *Ross*, 33 F.3d at 1519-1521.

and the defendants and that such a step was not a reflection on either party. *Id.* at 25a. Accordingly, because petitioners' rights were adequately protected and the decision below accords with the views of every other circuit that has addressed the issue, further review is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1997

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(3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANTHONY J. TUSA, JR., AND VICTOR J. TUSA, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . (ii)

INTRODUCTION 1

ARGUMENT 2

A. The Government's Fact Statement Is Misleading and Irrelevant. 2

B. *Carpenter* Does Not Resolve the Issue in the Government's Favor. 3

C. The Conflict Is Real. 4

D. The Anonymous Jury Issue Merits Review. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES:

Carpenter v. United States, 484 U.S. 19 (1987) 3-4

McNally v. United States, 483 U.S. 350 (1987) 3-4

Toulabi v. United States, 875 F.2d 122 (7th Cir. 1989) 5, 6

United States v. Frost, No. 95-6004, 1997 WL 563304 (6th Cir. Sept. 12, 1997) 2, 4

United States v. Granberry, 908 F.2d 278 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991) 5

United States v. Kato, 878 F.2d 267 (9th Cir. 1989) 5

United States v. Murphy, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988) 5

United States v. Novod, 923 F.2d 970 (2d Cir.), *cert. denied*, 500 U.S. 919 (1991) 3-4

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992) 6-7

United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991) 5

United States v. Vario, 943 F.2d 236 (2d Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992) 8

STATUTES:

18 U.S.C. § 1346 . . . . . 4-5, 7

No. 97-236

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ANTHONY J. TUSA, JR., AND VICTOR J. TUSA, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

INTRODUCTION

The government's brief in opposition devotes much attention to a one-sided factual recitation, but little to the principal question presented: whether the Court should resolve a persistent inter-circuit conflict over whether an unissued license is the government's "property" under the mail fraud statute. On that issue, the government's perfunctory effort to reconcile the decision below with rulings of other circuits cannot obscure the disagreement

among the circuits — a conflict most recently recognized by the Sixth Circuit in a decision issued after the filing of the petition for certiorari, *United States v. Frost*, No. 95-6004, 1997 WL 563304 (6th Cir. Sept. 12, 1997). This Court should grant certiorari to put to rest the substantial dispute among the courts of appeals over a critically important federal criminal statute.

ARGUMENT

A. The Government's Fact Statement Is Misleading and Irrelevant.

The government devotes much of its opposition to an account of the evidence at trial, including intercepted conversations in which, the government asserts, petitioners Anthony and Victor Tusa expressed a desire to "deal with [the] Marcello family head . . . or with family members," stated that they wanted to have a "'sit down' meeting with the mob members" to discuss "business with the mob," sought approval of their business arrangements from "the Marcello crime family," and were told to "provide the Marcello crime family" with a share of their profits. Opp. 4-5. The actual conversations, of course, contained no such references to "the Marcello crime family" or "the mob." Only with the aid of "translation" by an expert witness were the conversations subject to such interpretations, and the Fifth Circuit itself acknowledged that "the tapes do not rule out the Tusas' contention that they engaged in arms-length, legitimate business negotiations . . . ." Pet. App. 7a.

To be sure, the jury found the Tusas did not disclose to the state some material information about their business dealings with companies the government claimed were dominated by organized crime, but the government substantially overstates the evidence of the Tusas' dealings

with organized crime figures. More importantly, the government's prejudicial factual exposition is *irrelevant* to the questions presented. It is clear, and the government does not dispute, that the Tusas' mail fraud convictions depend on whether, in obtaining video gaming licenses from the state, they sought to deprive the state of "property" under the mail fraud statute. The strength or weakness of the government's evidence has no bearing on that issue.

B. *Carpenter* Does Not Resolve the Issue in the Government's Favor.

When it does finally address the property issue, the government relies primarily on the contention that the Court should deny certiorari because the Fifth Circuit's decision is simply a correct application of *Carpenter v. United States*, 484 U.S. 19 (1987). But citing *Carpenter* does nothing to answer the point that the courts of appeals are in disarray over whether an unissued license in the hands of the government constitutes property under *Carpenter* and its predecessor, *McNally v. United States*, 483 U.S. 350 (1987).

Indeed, *all* the appellate decisions finding that such licenses are not property *postdate Carpenter*. And even those appellate judges who have accepted the government's view of the issue have recognized that *Carpenter* does not definitively resolve it in the government's favor. Thus, in *United States v. Novod*, 923 F.2d 970 (2d Cir. 1991), the panel majority (which agreed with the government's position but was bound by prior Second Circuit precedent to hold that licenses were not property) stated:

> *McNally* and *Carpenter* taken together establish that "property" under the statutes encompasses things, however, intangible, that are currently of value to their owners. But

> the cases say nothing about schemes to defraud a state government into granting a discretionary permit.

Id. at 974. Similarly, the Fifth Circuit in this case acknowledged that "neither *McNally* nor *Carpenter* directly answer[s] the question at issue." Pet. App. 12a. Simply invoking *Carpenter* cannot make the issue go away.

C. The Conflict Is Real.

The conflict among the circuits over whether an unissued license is "property" under the mail fraud statute was underscored most recently by the Sixth Circuit in *United States v. Frost*, No. 95-6004, 1997 WL 563304 (6th Cir. Sept. 12, 1997). There, the Sixth Circuit reiterated its view "that the government does not have a property right in a license which it has not issued yet for the purposes of the mail fraud statute." *Id.* at *20. Acknowledging the disagreement among the circuits, the Sixth Circuit cited the Fifth Circuit's decision in this case with a "but see."

The government itself has previously acknowledged to this Court that there is "disagreement in the courts of appeals as to whether, under McNally, an unissued license is property in the hands of the State." Brief for the United States in Opposition at 9, *Martinez v. United States*, No. 90-5753 (U.S. Nov. 19, 1990). However, in prior cases, the government argued that this conflict would disappear because of the passage of 18 U.S.C. § 1346. *Id.* at 8-9; *see also* Brief for the United States in Opposition at 7-8, *Bucuvalas v. United States*, No. 92-888 (U.S. Feb. 3, 1993). As the Fifth Circuit's decision in this case makes clear, however, the passage of Section 1346 has not resolved the issue in cases, such as this one, where the alleged fraud does not involve corruption of a public official or any other act that

deprives a person of the "right to honest services." *See* Pet. App. 14a, n.1. Accordingly, the government no longer attempts to argue directly that the passage of Section 1346 deprives the issue of continuing importance. [1]

Instead, the government says this case really presents no conflict because, under the Louisiana licensing scheme, the state is entitled to significant fees once a license issues. According to the government, this distinguishes the case from all those in which other courts of appeals have issued contrary holdings on the "license as property" issue.

Not even the Fifth Circuit, however, thought the fee-generating nature of the video poker licenses sufficed to distinguish this case from all others. Rather, the Fifth Circuit recognized that its holding was directly at odds with decisions that relied on what it referred to as the "issued-unissued distinction" — namely, *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989), and *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988). *See* Pet. App. 15a-16a. The Fifth Circuit relied on the revenue-generating nature of the licenses only to distinguish one line of reasoning in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), and *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989), which the court characterized as resting in part on a view that the state's interest in licenses was purely "regulatory."

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[1] The government offers, as a footnoted aside, the observation that most of the decisions on which the petitioners rely arose from schemes executed before the enactment of Section 1346. Opp. at 12, n.8. But given that the Fifth Circuit disclaimed any reliance on Section 1346, and that the government offers no theory as to how Section 1346 could possibly apply to the charges against the petitioners (or to the charges that were the subject of the conflicting decisions), the government's observation is irrelevant.

In fact, the revenue-generating features of the video poker licenses do not distinguish the reasoning of *any* of the decisions holding that unissued licenses are not property of the government for purposes of the mail fraud statute. It is a nearly universal feature of licenses that the government receives money for issuing them. If that made the licenses property, then undoubtedly all of the cases holding licenses not to be property would come out the other way. As the government notes (Opp. at 12), most of those cases have not addressed whether or not the government received a license fee (*but see Toulabi v. United States*, 875 F.2d at 125 (noting requirement of fee)), but that is only because the government's entitlement to license fees was irrelevant under the analysis of those cases.

The reason is simple. Although the government may be entitled to receive fees after it *issues* a license, that does not make an *unissued* license property. Nor does a licensee *deprive* the government of property when it procures a license that entitles the government to fees from the licensee. Far from depriving the government of property, the licensee's actions give the government something it did not have before — an entitlement to fees from the licensee.

The point is illustrated by the Second Circuit's decision in *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991). In that case, the defendants had obtained waste disposal permits through false representations, *and* had schemed to deprive the government of fees associated with waste dumping. Nonetheless, the Second Circuit was careful to emphasize that the licenses themselves were not property. *Id.* at 1193-94. The defendants could, however, be convicted of mail fraud if they schemed to deprive the state of the *fees*, which were "money or property" under the statute. Thus, the Second Circuit held, "fraudulent procurement of a permit or license *in order to deprive the*

issuing authority of money or other pecuniary interests" is cognizable under the mail fraud statute. *Id.* at 1194 (emphasis added). But where (as here) there is no such proof, the mere allegation that the defendants schemed to defraud the state of the *license* does not suffice under the mail fraud statute, notwithstanding that fees associated with the licensed activity generated revenues for the state. *See id.* at 1197. *Paccione*'s analysis refutes the government's position that the fee-generating character of the video poker licenses in this case distinguishes those cases that hold that unissued licenses are not property of the government.

Ultimately, the government cannot convincingly deny that the heart of the Fifth Circuit's decision is its holding that the "right to control" issuance of licenses is "property" under the mail fraud statute (Pet. App. 14a-15a) — a holding squarely in conflict with holdings of the Second, Sixth, Seventh, Eighth and Ninth Circuits, though consistent with rulings of the First and Third Circuits. This case makes clear that this long-festering conflict among the circuits over perhaps the most widely used federal criminal statute will not simply disappear because of the passage of 18 U.S.C. § 1346. Until the Court addresses the issue, prosecutors in the First, Third and Fifth Circuits will remain free to continue their ever-increasing use of the mail fraud statute against state regulatory violations that, in other circuits, are not federal crimes at all. It is time that this Court resolve the issue.

D. The Anonymous Jury Issue Merits Review.

The government's brief in opposition confirms that the Fifth Circuit deferred to the district court's decision to empanel an anonymous jury based only on the presence of one defendant alleged by the government to be a low-level

organized crime member and on a small number of newspaper articles about the case. The government's opposition concedes that there was no evidence that any defendant who went to trial posed any threat to the jurors.

The Fifth Circuit's willingness to countenance an anonymous jury on these facts not only runs counter to the Second Circuit's holding that anonymous juries must be subjected to "close judicial scrutiny" and that a mere allegation of organized crime membership does not suffice to justify an anonymous jury, *see United States v. Vario*, 943 F.2d 236, 239-41 (2d Cir. 1991), but also makes a mockery of the Fifth Circuit's own purported recognition that an anonymous jury "is a 'drastic measure' that should be utilized only in limited circumstances." Pet. App. 22a. As explained in the reply of codefendant Salvatore in No. 97-5469, the government's reliance on the absence of a circuit conflict on the abstract question whether an abuse of discretion standard applies to this issue misses the point that the manner in which the Fifth Circuit exercised its review for abuse of discretion, the result reached by the Fifth Circuit, and the procedures employed in the trial court all depart from prior appellate decisions on the use of anonymous juries. Moreover, the appropriateness of deferential review, given the significant constitutional issues at stake, itself merits consideration by this Court.

In view of the importance of a defendant's interest in a public trial, and the increasing frequency of resort to the device of anonymous juries, the use of anonymous juries is an issue that this Court must one day address. The facts of this case, and the *ex parte* procedures used by the trial court, make this a particularly appropriate case in which to review the limits on use of this "drastic measure." The Court should grant certiorari not only to resolve the conflict among the circuits over whether unissued licenses are property

under the mail fraud statute, but also to address the important issues posed by the use of an anonymous jury in this case.

CONCLUSION

For the foregoing reasons, as well as those previously set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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